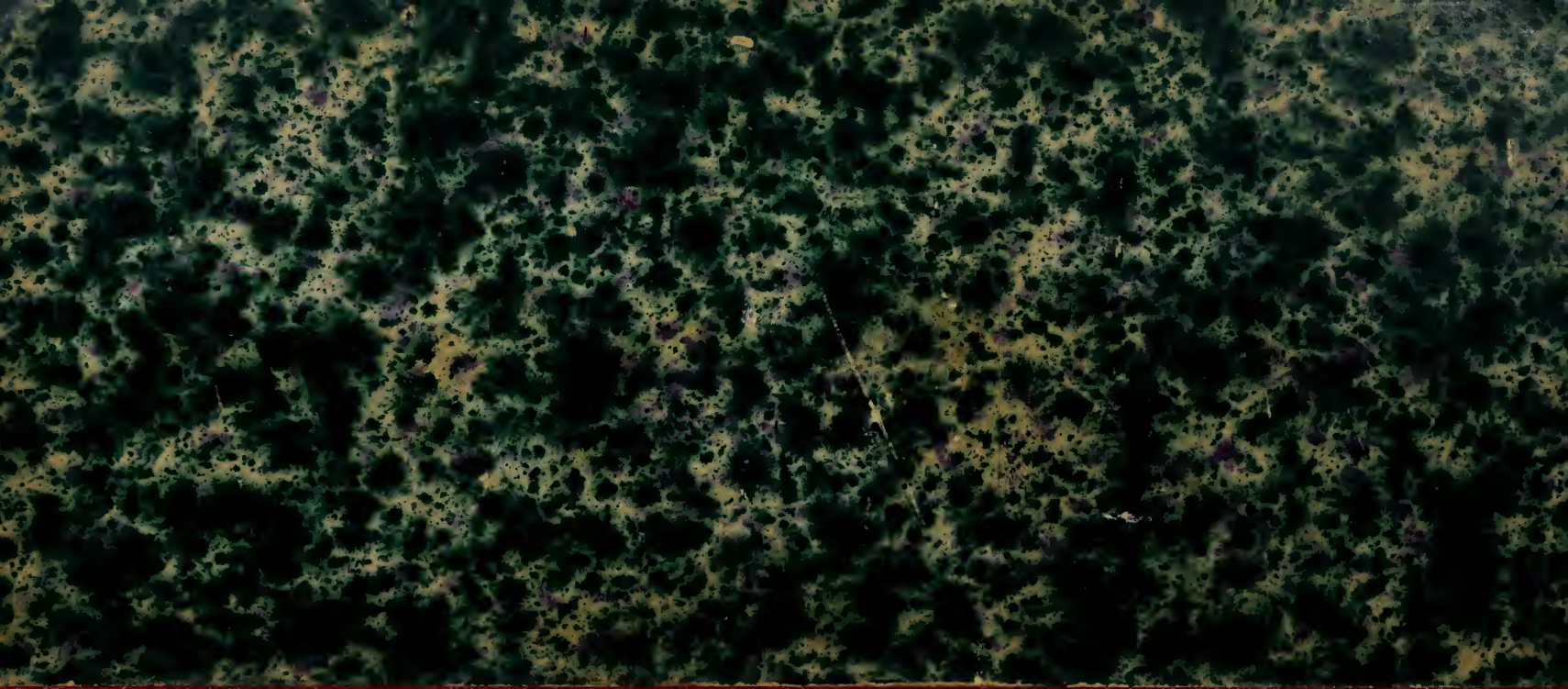

REMARKS

ON THE

HON. EDWARD LIVINGSTON'S

INTRODUCTORY REPORT

TO HIS

SYSTEM OF PENAL LAW,

PREPARED FOR THE

STATE OF LOUISIANA.

By SETH LEWIS,
Author of Strictures on the same Penal Code.

NEW-ORLEANS.
PRINTED BY A. T. PENNIMAN & Co.

1831.

To the People of Louisiana, this work is respectfully inscribed, by

THE AUTHOR.

REMARKS,

On Hon, E. Livingston's Introductory Report, &c.

REMARKS

On the Honorable EDWARD LIVINGSTON'S* *"Introductory Report to the System of Penal Law, prepared for the State of Louisiana."*

PART FIRST.

IT will be recollected, that the first, and second books of this new Penal Code, were published in the year 1824, and laid before the legislature, at their session, which began, if I remember right, in November 1825. It will be recollected also, that the public sentiment was, at that time, highly favorable to the code, and that the general belief was, that it would pass without the least difficulty. No one seems to have suspected, that it contained any material defects; and very few seem to have thought it necessary to give it a serious, and critical examination; so entire was the confidence reposed in the virtue and wisdom of its author.

I had, from the first, believed the plan of reform embraced by that code, to be far too extensive; and that its execution must be attended, not only with the greatest difficulty, but with great danger; and after the code was published, I took the earliest opportunity of examining it. I confess I was disappointed; for I found it far worse than I could possibly have anticipated and this gave occasion to my strictures

* In my strictures, I styled the author of the Code, Dr. Livingston, as L. L. D. was annexed to his name in the title page of that work; some of his friends complained of my doing so, and for that reason only, the title is dropped in this work.

on that code, which were published in the latter part of the year 1825. The legislature was then in session—the members read my strictures and I have since been assured, by several of them, that such was the force of my objections to the code, that all thought of passing it was at once abandoned.

No attempt to answer my arguments, or to remove the force of my objections was ever made by any one else, until after the lapse of three years, when the entire code, accompanied with several introductory reports were presented to the governor, and by him laid before the legislature, at their last session; and were by them reported to a committee for examination during the recess; so that a new effort is made to get the code adopted.

Such was the situation of the code when, on the 15th of February last, I received from its author the following letter, which, as it shows the occasion of my resuming this subject, and contains nothing private nor confidential, I deem it proper to insert in this place. It is as follows:—

On board steam-boat Isabella,
January 28, 1829.

DEAR SIR:

I wished very much to have some conversation with you previous to my departure from New-Orleans, but was prevented by the business preparatory to my departure. Your address to the legislature* containing strictures on my code, was sent to me by a friend very soon after its publication. I thought, on perusing it, that I had some reason to complain of the manner in which the author, as well as the work itself was treated, and my first impression was

* It was addressed "To the People of Louisiana."

to answer it. Further, and I think better reflection induced me to change my design. Had I examined it at that moment, some warmth of feeling would have discovered itself inconsistant with the dispassionate decision which the subject required, and I should have been involved in controversy, when all my faculties ought to be employed, not in examining objections, but coolly weighing their force, and yielding to such as appeared to be well taken. Your pamphlet was written before the Code of Procedure, and of Prison Discipline had been printed. You will find some of your objections obviated by the provisions in those parts of the work; and in the three introductory reports, which are now laid before the legislature, you will find the reasons detailed which have prevented my yielding to others; as well as the reasoning on which the whole plan has been formed. The object of my intended interview was, and of this letter is, to request that you will take the trouble to read those three reports, and the amendments which have been made to the codes which have been lately communicated to the governor, to be submitted to the legislature, and that after maturely considering the whole at your leisure, you will favor me with your opinion on such parts as you think objectionable. The high respect which I have always had for that opinion will induce me to give it the greatest weight, and although I cannot promise to take it as my guide, I will promise to examine it with the sincerest design o yield it, in all such parts as I cannot answer satisfactorily to my best reason and my conscience.

I am with great respect and esteem,
Your most obedient servant.
(Signed) **EDWARD LIVINGSTON.**"

To the foregoing letter, I returned the following answer:—

Opelousas, 16th February 1829.

Dear Sir:

I hasten to acknowledge the receipt of your polite letter, dated on board the steamboat Isabella, January 28th, which came to hand yesterday. You think, that in my strictures on your Penal Code you found some reason to complain of my manner of treating the author, as well as the work itself of that code. On this I can only say, that in writing my strictures, it was my constant endeavor to avoid every thing that might give any just cause for such a complaint; and also to avoid every thing like severity, except where the work itself appeared to me to justify it. Candor however, requires me to add, that, though I am not conscious of it, in this I may have failed; and if so, I can with truth assure you, the fault was unintentional, and I regret it. Truth, not controversy, was then, as I trust it always will be, my object.

Your Code of Procedure I have, but the Code of Prison Discipline, and the three introductory reports you mention, I have not yet seen. I will however, as you request, endeavor to procure them as soon as possible, and read them with attention; after which, I will communicate to you my thoughts concerning them. If your reasoning convinces me, I shall frankly acknowledge it; if not, I shall endeavor to assign my reason for differing from you in opinion. I must however reserve the privilege of assigning those reasons through the press, should I deem it proper to do so.

At present I will only add, that your Code of Prison Discipline comes not within my plan. That

part of the law which prescribes the *mode*, and *quantum* of punishments, I consider as a distinct branch of the criminal law, in which there may be room for amendment. Indeed this branch of the law seems never to have been well settled any where. Not so all those provisions of law, which define crimes* and misdemeanors, and govern the proceedings in criminal prosecutions from their commencement, until the final judgment. All these I consider as being already wisely settled, and resting on the firm ground of experience.

I am with great respect,
Your obedient servant,
SETH LEWIS.

Thus I found myself called on, to take up once more this important subject. I shall not decline the task. My motive at first, for taking it in hand, was a deep sense of the very great importance of the subject, together with a strong conviction on my mind, of the dreadful evils that code must produce, if ever it be passed into a law. The same motives still exist, and forbid me to be silent, so long as a hope remains of averting those evils, and preserving our present excellent system of criminal laws, which that code seeks utterly to destroy. The task, I am aware, is arduous, and laborious. Reward, I have received none, nor do I expect any, save only that which naturally springs from the consciousness of having done, or endeavored to do good.

And now to the business in hand. I shall first take up the report, which is mentioned in the title of

*From this I should have expected several crimes created by our statute, which are not so clearly defined as it is desirable they should be. This will be further noticed in the course of this work.

these remarks; and afterwards I may offer some remarks on the other. The report now before me covers the whole ground occupied by my strictures. It is a laboured effort to retrieve the last credit of the code, and persuade the legislature to adopt it; in which the author has evidently put forth all his strength, and displayed the greatest anxiety to succeed. It is divided into three parts, in the first of which, he undertakes to prove, that our present system is defective, so as to render the adoption of his code necessary;—in the second, he undertakes to answer the objections that have been made to that work; and in the third he reviews his own code, and endeavors to prove it to be a good one. His argument therefore, when stated in logical form, may be expressed as follows:—

"Our present system of criminal law is essentially defective, and stands in great need of a thorough reform.

"By adopting the code he has drawn up, that reform will be effected, and the system rendered complete, and good in all its provisions.

"Therefore the code ought to be adopted."

Now in this argument, the major and the minor propositions are both denied: and we undertake, on the contrary, to vindicate our present system, and show that it is not defective, in any material point—and that his code is vicious and bad, in some of its most important provisions.

We shall now proceed to examine the objections he urges against our present system. He draws his first argument from the act of the legislature of February 10, 1820, under the authority of which he prepared his code; together with a resolution passed at a subsequent session in March, 1822. The act recites that

our criminal law is "defective, in many, or all of the points" therein enumerated; and the points enumerated embrace the whole body of the law. The resolution approves the plan, and specimen of the code, which our author had prepared, and laid before the legislature; and requests him to proceed with the work: and these authorities are produced, in the report before us, as *proof* that our present system of criminal law, is defective. In answer to this I shall produce several authorities against it. 1st, That of the legislature who adopted, and enforced this system, in the year 1805; they certainly considered the system a good one, else they never would have adopted, and enforced it. 2nd, That of the congress of the United States; who by their act of March 26, 1805, introduced, and enforced the same system into the territory of Orleans, as will be shown more at large hereafter. 3d, That of the congress of 1787, who, by the ordinance they past for the government of the territory north west of the river Ohio, enforced the same system in that territory. 4th That, of the subsequent acts of congress, by which the same ordinance, and along with it the same system of laws was extended, successively, to the south-western territory, now the state of Tennessee; to the Mississippi Territory, and I believe to all the rest of the territories of the United States. All these legislative bodies have considered the system a good one; otherwise they never would have extended it to their territories, as they did. And lastly, that of every state in the Union, who are all governed by the same system of laws; and all of them approve of it; unless we consider Louisiana as an exception, which is not yet finally decided: And I may add to this the proof, which the experience of ages gives in favor of this same system. Now, when the weight of these authorities is

thrown into the balance, I willingly leave that scale to preponderate, which has the greatest weight in it.

Our author however appeals to truth, and reason, and tells us that he will not "take shelter behind any authority." Why then produce that authority, and employ, as he has done, several pages in stating it? Why refer to it, and rely on it, as he frequently does, in his report?

Before I proceed further, I deem it proper to state precisely, the ground I mean to occupy, in these remarks. Criminal law consists of two *distinct branches*, each having its distinct object in view. These objects are, first, to ascertain, and determine, with all the certainty that is possible, whether the accused be guilty, or innocent of the charge preferred against him. And secondly, if guilty, then to inflict the punishment, in order to prevent the commission of crime. To attain the first of these objects, all those rules of law which govern the prosecution, and the trial, until the guilt or innocence of the accused is finally ascertained, and determined, are called into action: and it is obvious at first sight, that this branch of the law is incomparably the most important. Every thing, in truth, depends on it, since the whole efficacy of punishment, depends on the guilt of the accused being clearly and satisfactorily ascertained: unless this be first clearly ascertained, no punishment can be inflicted without absolute injustice; nor without counteracting the very object of the law. And, as this branch of the law is the most important, so it is far the most extensive, amounting to more than three-fourths, perhaps I might say to seven-eighths of the whole law. Now it is this great and important branch of our law that I have undertaken to vindicate. The other branch, that which *prescribes the punishment*, and directs *the*

mode of inflicting it, is admitted to stand in need of revision and amendment. But this branch of the law is obviously subsequent to the former, and cannot begin to operate until that has had its full effect; since no punishment can be inflicted until the accused be found guilty, and the final sentence be pronounced.

Now, Mr. Livingston every where confounds those two distinct branches of our law; and, as there are some real defects in the latter, he thence argues that *the whole law* is equally defective; than which no fallacy can be greater. As well might it be argued, that because a planter has one acre of bad land in his field, therefore his whole plantation, consisting of a thousand acres, is all equally bad.

Another fallacy of the same kind runs through his report. There are a few questions on which, on account of their intrinsic difficulty, the common law has never been thoroughly settled. Such questions, it is well known exist also in the civil law, and in every system of human laws that ever yet have been formed. No system of laws ever yet formed by man, has been without some unsettled points of this kind; and Mr. Livingston cannot show that they are more numerous in the common, than they are in the civil law. Yet he has produced a few of these unsettled points and holds them up as proof that *the whole* common law is equally unsettled and uncertain. I cannot suppose that he has adopted this mode of argument from choice: he has been driven to it by the nature of the cause he advocates, which affords him nothing better.

He proceeds: "to effect the object of Penal Laws," says he, page 7, "there must be rules established by legislative authority. These rules must be known;

and to be known, they must be promulgated. But the rule can neither be made, nor be known, nor promulgated unless it be clothed in words. Are these words to be oral, or written, is the first question? A strange one, yet seriously made; seriously answered in favor of traditional law, by lawyers, by judges, and by men whose situation gives influence, and whose opinions have weight. Such are the advocates for retaining the reference to the English common law, which forms a part of our criminal jurisprudence; that part is not inconsiderable, it pervades the whole mass of our legislation on the subject."

Several things are here to be noticed. 1st. He admits the extent and importance of the common law part of our system. "It pervades the whole mass of our legislation;" say, rather, the whole mass of our *criminal jurisprudence*, for this is the fact. It is this very part of our system that furnishes mostly all those excellent rules, by which the guilt, or innocence of the accused is ascertained, and which the experience of ages has approved, and does still approve. 2nd. He treats the common law as being merely "oral," as if it were not reduced to writing at all, which is not the fact. 3d. He represents it as being handed down to us from former times by mere oral tradition. But this again is not the fact. Every being knows that it has been handed down to us, in the recorded decisions of the highest tribunals of the nation; which are received as authoritative declarations of what the law is, in each adjudged case. On what the binding force of these decisions depends is a different question.

This question is of importance in this controversy; and as Mr. Livingston directs the main force of his at-

tack upon our present system against the common law part of it, and represents it as destitute of any real binding force, and holds it up as an object worthy only of scorn and contempt, I shall here show the ground on which the authority of the common law rests. And this I choose to do in the words of Blackstone, whose authority, as a writer on that system of laws, every body knows and acknowledges.

That author, vol. 1, page 68, lays down the principle of the common law, and says, "The authority of these maxims rests entirely upon general reception and usage, and the only method of proving that this, or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it."

"But here a very material question arises: how are these customs to be known, and by whom is their validity to be determined? The answer is, by the Judges of the several Courts of Justice. They are the depositories of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the *viginte annorum lucubrationes*, which Fortescue mentions; and from being long personnally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal, and most authoritative evidence that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved under the name of *records*, in public repositories, set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents

may give light or assistance. For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being formerly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which is not in the breast of any subsequent judge to alter, or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws, and customs of the land: not delegated to pronounce a new law, but to maintain and expound the old one.

"Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases, the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For, if it be found that the former decision is manifestly absurd, or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is, that our lawyers are, with justice, so copious in their encomiums on the reason of the common law; that they tell us that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason, is not law. Not that the particular reason of every rule in the law can, at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to

be well founded; and it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered, or discerned, hath been wantonly broken in upon by statutes, or new resolutions, the wisdom of the rule hath in the end appeared, from the inconveniencies that have followed the innovation.

"The doctrine of the law then is this: that precedents and rules must be followed unless flatly absurd, or unjust; for though the reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose that they acted wholly without consideration."

Again, the same author, page 63 of the same volume, adds: "But with us at present the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports of judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However I style these parts of our law *leges non scripta*, because their original institution and authority are not set down in writing, as acts of parliament are; but they receive their binding power, and force of laws by long and immemorial usage, and their universal reception throughout the kingdom."

In this passage, Mr. Livingston's notion, that the common law is merely "oral" on which he lays so much stress, is directly contradicted. It is *written*, "in the records of the decisions" of the courts of justice "in the treatises of the learned sages of the profession, and handed down to us from times of the highest antiquity. Away, then, with his strange notion, that the common law is "necessarily unknown" because, as he pretends, it is unwritten."

But its binding force.—Mr. Livingston himself, in another place, tells us whence it derives its binding force of law. "If" says he, "the case be a new one," *i. e.* one for which no positive law has provided; "he (the judge) must decide without positive laws," he must frame his judgment by analogical reasoning from the law in similar cases; and if it be correctly drawn, it will be respected for its wisdom, and abridge by its adoption the labor of further investigation in subsequent discussions of analogous cases. Thus the jurisprudence of decrees, or the authority of precedent, is by degrees established in civil cases; first, from the necessity of deciding conflicting claims, and afterwards from the very great advantage of having fixed principles." Is it not strange that after writing this passage he should still represent this "jurisprudence of decrees," or authority of precedent, as destitute of any binding force? for this "jurisprudence" as he calls it, and not improperly, rests, for its binding force, on precisely the same ground with the common law. The principle being settled by judicial decision, is acquiesced in, and afterwards has the force of law from that very acquiescence, which becomes universal throughout the nation, or State.

And here, I beg leave to fortify these positions by a very able and lucid opinion of our own Supreme Court, delivered by Judge Porter, in the case of Saul vs. his Creditors, 5 Mart. Rep. New Series, page 581. In looking into the laws of any country, "says the learned Judge," we stop at the threshold, if we look no further than their statutes; and what we see there, would in most instances only tend to mislead. In every nation, that has advanced a few steps beyond the first organization of political society, and that has made any progress in civilization, a more extensive, and equally important

part of the rules which govern man is derived from what is called in certain countries common law,and here, jurisprudence.

This jurisprudence, or common law, in some countries is found in the decrees of their courts; in others it is furnished by private individuals, eminent for their learning and integrity, whose superior wisdom has enabled them to gain the proud distinction of legislating, as it were, for their country, and enforcing their legislation by the noblest of all means, that of reason. After a long series of years it is sometimes difficult to say, whether these opinions were originally the *effect* of principles previously existing in society, or whether they were the *cause* of the doctrines which all men at last recognize. But whether the one, or the other, when acquiesced in for ages,their force and effect cannot be distinguished from statutory law. No civilized nation has been without such a system; none can do without it; and every attempt to repel it, only causes it to return with increased strength on those who are so sanguine as to think that it may be dispensed with."

If there be any one thing more impossible than another, it is the attempt to provide by positive legislative acts, or by codes of positive laws, for all the cases that arise in human society. And yet to do this, seems to be a favorite object with Mr. Livingston. Not only will unforeseen cases arise, but positive laws, or statutes are themselves a most fertile source, from whence this "jurisprudence of decrees" or common law does, and must necessarily arise, in spite of every attempt that can be made to prevent it.

When the legislature have enacted a statute, or a code of laws, they have done all the constitution permits

them to do. At that point their constitutional powers cease. They have no more authority to *construe* the law, and apply it to cases, in the administration of justice than the courts have to legislate. This power is given exclusively to the Judiciary. The Judicial Courts then are of necessity to *construe* the law, and find out its true meaning, in applying it to cases brought before them; and questions of this kind are well known to be not a few—and it is equally well known, that just in proportion as the numbers of positive laws increase, so the number of these questions arising out of them increases. Now when any one of these questions is decided, the decision must remain as a rule in all subsequent analogous cases. Without this there could be no settled rule to guide us in construing and applying the law to cases; and consequently none by which to determine what *effect* the law is to have. These decisions then constitute the common law, or if you please, the "jurisprudence of decrees, or authority of precedent," the binding force of which Mr. Livingston himself, admits in the passage just before quoted.

Reject the authority of this jurisprudence and it is easy to show that the consequences would be ruinous. For example: an article of positive law prescribes a rule for governing the titles to real estates; and under this article I want to know whether I can safely purchase an estate, the title to which is laid before me. I look into the law, and from that the title appears doubtful. This is a very common case. But on looking into the reports of adjudged cases, I find the doubt has been solved: and relying on the authority of the decision, I go on and make the purchase. Now if the decision is to be respected as an authoritative rule, I am safe; if not, my title is worth nothing; for then, a contrary decision may

be made on the very same article, which will destroy my title. Thus it is obvious the security of every title in the State depends, in a greater or less degree, on the authority of this jurisprudence, or common law being maintained and adhered to.

This common law then, or jurisprudence (whichever term may be prefered, for the thing itself is still the same,) grows out of the legislation of every civilized country, and is as essential to the efficacy of the laws, as the blood flowing in the veins is to the life of the human body.—Destroy it, and you thereby reduce all positive laws to a mere dead letter, or you convert them into something worse: for then each succeeding judge would be bound by no precedent, and would be at liberty to constitute those laws, not according to any established rules, but according to his own private judgment: in other words no rules to govern us would remain.

If this be so, will Mr. Livingston contend for what he hints at, that this "jurisprudence of decrees, or authority of precedent" is to be confined to "civil cases?" If it be essential in these, is it less so in criminal cases? Far from it. Every one, on a moment's reflection, will see, that if there be a difference, it is more essential in the latter, than in the former class of cases.

This view of the subject also shows the folly of attempting to form a complete system of laws by legislative enactments alone. Both the legislature and the judiciary were concerned in this important work—the legislature to provide positive laws when necessary; and the judiciary to construe and declare their meaning, and thereby form, and preserve the jurisprudence, which we have just seen constitutes so essential a part of every system of laws. And yet the fallacious idea that the legislature is to do all, and the judiciary nothing in this

great work, runs through the whole of the report under review, and seems to be a favorite object of its author.

"But," he proceeds to say, "we want to know what theft or murder, or any other offence on the list is, if we wish to know what means we may use to prevent either of these crimes; how the offender is to be arrested, how confined, how bailed, how tried, what evidence can be admitted, what is required for conviction; for all these, and an hundred other questions equally important, we are refered to the *common law of England;* that is to say, what one of its greatest panegyrists styles 'the unwritten, or common law,' consisting of 'general customs —of '*particular customs*'—and of 'certain particular laws, which *by custom are adopted and used by some particular courts*:' the whole resting as we see upon *custom:* and when we enquire how these 'customs' are to be known, the same author gives the answer 'by Judges'—who, he says, 'are the depositories of the laws, the living oracles, who must decide in all cases of doubt, &c.' Here then we see what is our law. It is the unwritten customs of England, which from the same authority we are told it requires twenty years close study for a judge to understand; and which (without fear of incurring the charge of presumption,) I will add, no man ever did, or ever will understand—for this plain reason, that in many cases it does not exist until the case arises which calls for its application; there it is pronounced, not by the legislature, but by one of those living oracles. It is a maxim with the English lawyers, that the common law is the perfection of reason. No case, therefore, can be supposed to be unprovided for by it, and consequently whenever a new case arises, and no response has been given that will fit it, the judge must create one, and although it has never before been spoken,

or written, or applied, we must believe it from time immemorial to have been a part of the *custom* of England, which involves the absurdity of supposing that to have been immemorial usage, which was never before heard of." page 7.

If this be an attempt to hold up the common law as an object of ridicule, as to me it evidently appears to be, it is out of place. That system of laws by which two of the most enlightened nations on earth are governed, and the United States and England both are, cannot be an object of ridicule. It cannot be a congeries of absurdities, as Mr. Livingston here represents it. And he might have recollected too, that ridicule is not argument.

If Mr. Livingston intended this passage as his account of the common law, it is still more exceptionable. Scarcely a single position contained in it is correct; as the reader will clearly perceive, if he will compare it with the account given by Blackstone in the passage above quoted from him. It is obviously from that very passage of Blackstone that Mr. Livingston has formed his statement; but on comparing the passages it will be seen how strangely he has perverted his author's meaning. For example: the common law, he says, "one of its greatest panegyrists styles 'the unwritten or common law,' consisting of *general customs*, and *particular customs*—and if "certain particular laws which *by custom are adopted and used by some particular courts.*" But Blackstone's account is very different. It is as follows: "The *lex non scripta*, or unwritten law includes not only general customs, or the common law properly so called, but also the *particular customs* of certain parts of the kingdom, and likewise those particular laws that are by custom observed in certain courts and jurisdictions." 1 Blackstone 63.

In this passage the *lex non scripta*, and the *unwritten law* are one and the same, the latter being merely a translation of the former; and the *common law* is stated to be "included" in the *unwritten law* as *a part* of it only; but Mr. Livingston says "the *unwritten* or *common law*, consisting of general customs, &c." making the common law to be *the whole* of the unwritten law, instead of *a part* of it only, as it really is. Blackstone states those *particular customs* to be parts of the *unwritten law*, but no parts at all of the *common law*;—Mr. Livingston makes them to be part of the *common law*, which they are not. Strange perversion of that author's meaning!

Again he insinuates what he does not venture to assert in direct terms. "If we wish," says he, "to know by what means we may prevent crime, how the offender is to bearrested, how bailed, how tried, &c.;" he does not venture to say in terms, that the common law does not furnish rules for all these things, for every body knows that it does; but he answers, "for all these, and an hundred other questions equally important we are refered to the *common law of England*," and leaves it to be inforced from the absurd and ridiculous account he gives of that system of laws, that no such rules are to be found in it! an inference which he will hardly venture to assert in terms.

Again he says: "And when we enquire how these 'customs' are to be known the same author gives the answer, "by Judges." But "the same author," gives a very different account of the matter. He tells us that "the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports of judicial decisions, and in treatises of learned sages of the profession." In these, then,

the answer is to be found, and to these that author refers us.

Again: the judges "are the depositories of the law, the living oracles who must decide in all cases of doubt." True, they are to *decide* in all cases, as well those of doubt as all others. But the same author does not tell us that the judges must *make* the law, but the contrary.

Again: "It requires twenty years close study for a judge to understand" the common law. How much less does it require for a man to qualify himself to act as a judge in the civil law? Not one hour less in the one than the other.

But he says, "No man ever did, or ever will understand" the common law. If so, it follows that Mr. Livingston himself never did nor never will understand it, and consequently all he says about it cannot be of much authority.

But let us hear his reason for this assertion. It is, "that in many cases it does not exist until the case arises which calls for its application." That is, a new case will now and then arise, such as the legislature never thought of, and consequently one for which they have made no provision; and such as never before came before a court for decision, and consequently one for the decision of which there is no former precedent. In such a case it cannot be precisely known what the law is, until the case shall be decided. This is the whole amount of the common law, that "no man ever did or ever will understand, until the case arises which calls for its application!" And yet from this, Mr. Livingston argues that the whole common law cannot be understood. He forgets all the cases in which the law is already settled and well understood by former precedents,

which are so numerous as to leave but very little room for new cases to arise; he forgets that all cases are governed by positive law as far as the legislature has provided it, which is a rule of the common law itself; and he forgets that when such a new case arises, as is before supposed, the common law refers us to the original principles of natural justice for its decision.

Again he says: "Whenever a new case arises, and no response has been given that will fit it, the judge must create one." No response! But let that pass. Yes, in a new case, for which the legislature has not provided, and for which there exists no rule settled by former adjudged cases, the courts, as just now observed, must resort to the original principles of natural justice. In this way, and in such a case only, they must "create" a response, as Mr. Livingston in derision terms it; or, to speak correctly and truly, they must establish a new precedent; for they must of necessity decide the case, and no other law exists by which it is possible to decide it, but the original laws of natural justice. This is the whole amount of the "responses" which the courts "create."

But he says, that, "although it" (see the law as applied to such a new case) "has never before been spoken, or written, or applied, we must believe it from time immemorial to have been a part of the custom of England; which involves the absurdity of supposing that to have been immemorial, which was never before heard of." And so it is; for it is clearly immemorial usage to decide such a case, according to the laws of *natural justice*, which constitute the very essence and ground work of the common law; and I suppose Mr. Livingston will allow those laws of natural justice to be immemorial. The absurdity is of his own imagina-

tion. It arises from his shifting the meaning of a term, and putting the *decision*, or, in other words, the *application of the rule*, in place of the rule itself. Blackstone confirms this view of the subject in the passage above quoted. "The law," says he, "is the perfection of reason; it always intends to conform thereto, and whatever is not reason is not law." Now the principles of right reason, and those of natural justice, are one and the same.

In the same strain of, (as I consider it,) improper ridicule, Mr. Livingston proceeds: "These oracles," says he, "are not given, like those of the sybil, in writing; but, like most of those of antiquity, orally. The judge seldom or never writes his own decision. The words of inspiration are caught by the reporter, and he publishes them. Here, it would be supposed, an opportunity is afforded of knowing with some certainty what the law is. To the people? No. The size, the number, the price, and the disgusting verbosity of the volumes forbid it. To the lawyers, then, at least. Not even to them. The same causes prevent them from examining more than an index or abridgement; but even the few who are rich enough to buy, and have had leisure to examine those repositories of the law, with reference to a single point, (for the general study of them would consume the longest life,) even on that single point will find themselves sadly mistaken, if they look for certainty."

Here is an instance of that kind of fallacy I before noticed in page 7, of putting *a part* for *the whole*, and arguing from it as if it were the whole. Some "single point" may undoubtedly be found in the common law, as it may in the civil law, or in any other system of laws, on which, if we "look for

certainty," we shall be disappointed. But to argue from this that the whole law is destitute of any certainty, as Mr. Livingston does in this place, is absurd.

Whether the lawyers are able to find out what the law is, I leave those gentlemen to say. But it seems that "the size, the number, the price, and the disgusting verbosity of the volumes," oppose an insurmountable obstacle to the people's ever knowing the law. In page 3 of his report, he tells us that the common law is "*unwritten*, and therefore necessarily unknown." But here he complains that it cannot be known because it *is written* in too many volumes! And again, in page 55, he tells us that the people of the other states "are familiar with the technicalities of the law." Now, every body knows, that their laws and ours are the same, as to all that concerns the present discussion. How then comes it to pass, that the people of those states are so well acquainted with the law? How is it that they make out to wag along so comfortably, under such an enormous load of volumes? Mr. Livingston himself has given the true reason. "With them," he says, "the common law is indigenous;" the people have learned it by experience and observation, by attending the courts, serving on juries, and hearing the law there discussed, explained, and applied to cases; and afterwards discussing and inquiring into it among themselves, in their social intercourse. In this way it is, and not by reading that load of volumes, that those people have become "familiar with the technicalities of the law." And in the same way the people of this State have, at this day, become equally well acquainted with their laws, both civil and criminal.

If this be so, it is a fallacy to suppose that Mr. Livingston's code is necessary in order to inform the people what the law is.

Our author proceeds: "Hear," says he, "what Blackstone—(I take my authority only from professed admirers of this system)—hear what he says of the credit that is to be given to these reports: 'From the reign of Henry the VIII. to the present time, this task, [that of reporting] has been executed by many private and contemporary hands; who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very *crude and imperfect*, (perhaps *contradictory*) accounts of one and the same transaction.'" Here is another instance of the same kind of fallacy which was just now noticed. "*Sometimes*" reports have been published, which were "very crude and imperfect:" *ergo*, Mr. Livingston argues, *all* the reports that have been published are very crude and imperfect; and therefore no "credit is to be given" to any of them! Allow me to argue, in this way, and I can easily produce an argument that shall prove any thing. He forgets to inform us that these reports of adjudged cases are every day cited, and relied on, as authority in the trial of causes in court, where they are sure to undergo the severest examination, not only by the court, but by *opposing counsel*, in which, whatever *crudities* or *imperfections* they may contain, are absolutely sure to be detected and exposed; and that then, all such reports are no less sure to sink into contempt, and be no more heard of. And he forgets to notice that we have reports of a very different description, such as have stood the test of this severe

scrutiny, and are universally acknowledged authority; besides elementary treatises of equal authority.

In the same way, our author, in p. 9, produces the conflicting opinions of two writers upon the common law, on *a single point*. Blackstone, we have seen, lays down the rule to be, that the courts are bound to adhere to former precedents in all cases, but with *one exception;* which is, where the former precedent evidently appears to be flatly absurd, or unjust, or contrary to the divine law. Christian, who has written notes on Blackstone's work, contends that former precedents are binding *in all cases* without exception; and he instances the case of an act of parliament, which, by the common law, was to take effect by the first day of the session, in which it was passed, though it did not actually pass until some time afterwards; which would give it the effect of an *ex post facto,* and consequently of an unjust law. If this be produced to show that the rule, as laid down by Christian, may be the true rule of the common law, and may be found introduced into our system, the answer is at hand: Our own statutes have already provided that no *new law* is in force until it is promulgated. If it be intended to show that there is no certainty to be come at, as to the binding force of the common law, the authority of both those writers is against the position; for they both insist that former precedents are binding—one of them universally, and without exception; the other, with one single exception only. Besides, we have already seen that the common law, in this state, receives its binding force from our own statute laws. Or, finally, if the object be, to show that there is no certainty in the common law, here is a fallacy of the same kind with those before noticed. These writers

differ on *a single point,* and hence that single point remains doubtful; but that affords no argument to prove that the whole law is involved in doubt.

Our author proceeds. "Thus," says he, "the general assembly may form some idea of the nature of that law, to which our present system of criminal proceeding refers us, for the definition of certain offences, and for the rules of preventing, trying and punishing them. We see that it consists of unwritten rules, promulgated by the judges, by precedents, often incorrectly reported, of uncertain authority when known; to be followed, according to some writers, however unjust or absurd; and, according to others, to be modified according to the principles of *reason* and the *divine law,* that is to say, by the caprice, the bigotry, or the enthusiasm of the judge. What more uncertain rules can be referred to than human reason, or the dogmas of religion? What may appear reason to one is folly to another, and on no one subject does the mind of man take so wide a range, as in imagination respecting the divine will." All this is little more than a repetition of the same fallacies which have been already noticed. Yet it may not be improper to bestow a few passing remarks upon it. Whether the "idea" which "the general assembly may form" from his account of the common law part of our system, be a correct idea or not, the reader will determine. Our "rules for *punishing*" offences are not taken from the common law, as will be afterwards particularly shown; but are furnished by our own statutes. "Unwritten rules;" —we have already seen the fallacy of this. "Rules promulgated by the judges;"—of this also we have seen the fallacy. We have seen that the leading

principle of the common law, which governs in every case, is, that the positive laws enacted by the legislature take precedence of all others, except the constitution, which is itself positive law; that former precedents of course must yield to positive law, in every case for which the latter has provided; but where no such positive law has been provided, there former precedents are binding on the courts. But if a case arise which is not provided for by any positive law, and to which no former precedent can be found that is applicable, then, as there is an absolute necessity for such a case to be decided, when brought before the court, they must, as I before observed, decide it according to the original principles of reason and natural justice; and when decided, the decision remains as a rule for the decision of any subsequent case presenting the same circumstances. This is the whole amount of "rules promulgated by the judges"—the utmost extent to which the common law permits them to go; and this is the utmost extent that law permits them, as Mr. Livingston is pleased to express it, to "modify" the law according to "reason and the divine law." We see, then, how idle and unfounded are Mr. Livingston's exclamations about modifying the law "by the caprice, or the bigotry, or the enthusiasm of the judge"—or according to "the dogmas of religion." The common law absolutely forbids every thing of that kind. Did not Mr. Livingston know all this when he wrote his report?

The positions I here take are expressly laid down by Blackstone. "It is," says he, "an established rule to abide by former precedents, where the same points come again in litigation"—that "it is

not in the breast of any subsequent judge to alter or vary from them according to his private sentiments, he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land ; not delegated to pronounce a new law, but to maintain and expound the old one."

"Yet," he adds, "this rule admits ef exception, where the former determination is most evidently contrary to reason ; much more so, if it be clearly contrary to the divine law." And this "*exception*" from the general rule seems to be what Mr. Livingston here lays hold on, and produces it as if it were the *general rule itself*, arguing from it that the common law leaves the judges at liberty to "modify" the law according to their own private sentiments, or according to their own notions of the divine law, in all cases without exception ! Whereas, it is obvious that the exception, as it is cautiously laid down by that author, can include none but an extreme case ; one that is, as he expresses it, "most evidently contrary to reason," or "to the divine law"—one, the unreasonableness and injustice of which will be acknowledged by every rational mind at first sight.

But it is remarkable, that this is the very point on which Christian and Blackstone differ ; the former insisting that precedents are universally binding without exception ; and this very difference between those two writers is produced by Mr. Livingston, with a view of proving that the authority of former precedents is, in all cases, at least doubtful ! (See before page 18.) Now if Christian's opinion be correct it destroys, what ? Not the general rule ; for on that he agrees with Blackstone ; but it destroys

the *exception*, leaving the general rule in full force. Or, if the authority of these two writers be equal, then it renders the *exception* doubtful, but not the general rule, for they differ only about the exception. Or, if the opinion of Blackstone prevail, still the general rule is binding, with one single exception. In a word, a more groundless notion never was yet conceived, than to suppose that the common law permits its judges to "promulgate" rules of law as they may think proper, either "by precedents" or otherwise; or to disregard the authority of former precedents, or to "modify" them according to their own private sentiments; and much less according to "the caprice, the bigotry, or the enthusiasm of the judge," or his notions of "the dogmas of religion."

In p. 10, Mr. Livingston files a charge of inconsistency against the advocates of the present system; that at one time they say, "the body of the common law never can be reduced to writing;" and at another, "that it is already written." This inconsistency will not be found in any objections of mine. I have not said that the common law never can be reduced to writing. In fact, we all know that it is already reduced to writing; not in a code, like that in question, but in books of reports and elementary treatises. And we all know also, that in those books the whole body of that law is laid down, and illustrated, with all the clearness and precision of which human laws are susceptible. And, moreover, we know, that as it is there laid down, it is the recorded experience of those who have gone before us, and is far more valuable, on that very account, than any new code of laws can possibly be.

But what has this inconsistency to do in the present controversy? Our author does not even pretend to have reduced the common law to writing. On the contraay, he regrets it, and undertakes to treat it with censure and contempt; and labours to prove it essentially vicious. Nay, more; his code, if adopted, goes expressly to destroy it, and substitute an entire new code in place of it. Whether, therefore, the common law can, or cannot be reduced to writing, is not at all the question in hand. But what I do say is, that neither Mr. Livingston, nor any other man, can produce an entire new code, and substitute it in place of our present system of criminal laws, wholly abolishing the latter, without doing incalculable mischief.

Mr. Livingston then proceeds to state what he considers to be the evils resulting from either alternative of the inconsistency into which he supposes us to have fallen. "If," says he, p. 10, "all the precepts of the common law cannot be reduced to writing, then a part of them are not contained in the reporters or other writers to which we are usually referred. Where, then, are we to find this unrecorded part? In the unexplored mind of the judge. And when is it to be promulgated? For the first time after the case occurs, to which it is about to be applied." Now, I ask, what part of the law can this "unrecorded part" of it be? which thus remains unpromulgated, in the "unexplored mind of the judge," ready, as it were, to pounce upon the unwary, and devour him? Why, we have already seen that as far as our positive laws extend, they are binding in every case, so there is nothing unrecorded in these;—then, if there be no positive law which is applicable to the case in hand,

former precedents are binding, if any such there be. But these also are recorded. What then remains? Why, if a new case arise, to which there can be found no provision of positive law, nor any precedents in all the books of reports, that is applicable, then the judge must decide, as is before observed, according to the principles of natural justice; and that decision forms a new precedent. This is the total amount of law that remains in "the unexplored mind of the judge!" I confess I am amazed to find him seriously advancing such objections as this. He proceeds:

"And who is to record or remember it? And what is to be its authority?" We have seen what the authority of judicial decisions, as precedents, is.

"In our state, which of the seven independent judges is to be considered the oracle, when they differ? Can principle be more completely abandoned? Can common sense and common justice be more completely lost sight of? Can confusion be worse confounded than by this state of things? Here is a real defect in our system; one that is indeed a great one, and calls loudly for remedy. But it it exists, not in the common law part of the system, but *in our own statutes.* It is of great importance that the rules of law should be kept uniform throughout the state. But how is this to be done? It never can be done merely by legislative acts. It must be done by establishing a court of appeals in criminal cases; the authority of whose decisions shall extend throughout the state. The *law itself* is already in force throughout. But cases arise, in the construction of the laws, in which the most upright and enlightened judges frequently differ; and hence a diversity of rules *in the application* of the law to cases will arise, sometimes out of one and the same statute. This evil

never can be remedied by the legislature alone; for any act they may pass for that purpose, is still to be construed and applied to cases by the courts; and they may still differ in the construction even of that act itself. To remedy this evil, then, the legislature and the judiciary must co-operate. Neither can exercise the powers of the other. The legislature, as before observed, can no more construe their laws, and apply them to cases, than the courts can legislate. And hence there must be *one court*, whose authority extends over the whole state, as the legislature is *one*, and extends its authority over the whole. Here then, and here only, the remedy for this evil is found. Let a court of appeals be established, and then, as the law is binding on all alike, so it will be construed, and applied to cases, and its benefits extended alike to all throughout the state.

There is another argument still more forcible in favor of this measure. Not only the property of the citizen, but his reputation, his personal liberty, and even life itself may depend on the decision of a single question of law, which may arise in the course of a trial. Shall this depend on the opinion of a single judge; and be by him finally decided in the last resort, without appeal? Surely this ought not to be, and yet such is our present system. Such our statutes, not the common law, make it.

It is therefore wholly unjust to urge this defect as an objection to the common law part of our system, in which it does not exist. Nor can there be a greater mistake than to suppose that Mr. Livingston's code will remedy the evil. It contains not a single provision for correcting the organization of our courts, in which alone the defect is to be found. Nay, his code would increase the evil to a fearful extent; since for every sin-

gle question that can arise under our present system, for decision by the courts, there would arise many, perhaps an hundred, in settling the construction of the new code. This I think is satisfactorily shown in my strictures. It is easy then to perceive how greatly the evil, of which Mr. Livingston here so loudly complains, would be increased by adopting his code.

Our author then takes up the other alternative, and supposes the principles of the common law to be already reduced to writing. "But," says he, "where are they to be found? In voluminous reports, which it requires a great degree of intellect to collect—very large sums of money to purchase—a long life to read—and a superhuman intellect to understand, and reconcile with each other when they are read. They are to be found in commentaries and abridgements of those reports, scarcely less voluminous, in which precedents and arguments may be found for almost every position that may be taken by sophistry, or required for the indiscriminate defence of right and wrong; add to this that these sources of information are inaccessible to three-fourths of the inhabitants of this state, being written in a language which they cannot understand; and that of the other fourth, very few only have the time or the means of applying to them; and you have a state approaching to that which has been justly designated as a badge of the most abject slavery, that of being governed by unknown or uncertain laws."

Here is a new discovery, for which we are obliged to Mr. Livingston; which is, that to live under such "unknown, or uncertain laws" as ours are, is "a badge of the most abject slavery!" What abject slaves then must the whole people be, not only of Louisiana, but also all those in every one of the

states! for they are all living under the same "unknown or uncertain laws."

"Precedents and arguments, for almost every position that may be taken by sophistry, or required for the indiscriminate defence of right and wrong." Perhaps so; for in those books we find many arguments of counsel, who were employed in the cases reported; and, no doubt, in those, sophistry might find all she requires. Not so the decisions of the courts, to which alone we appeal to find what the law is, as they have declared it.

But those voluminous reports are written, it seems, in a language that "three-fourths of the people cannot understand." This is exaggerated. I do not believe there is, at this time, more than one-fourth of the people of this state who do not understand the English language. Very many of the French inhabitants understand it, and nearly all the rising generation apply themselves to learn it. Such indeed is the progress already made, as to afford strong ground for the belief that in a few years more, all will understand it. But, as I before observed, it is all a fallacy to suppose that the people, either of this or any other state, acquire their knowledge of the laws by reading those voluminous reports. The means by which they acquire that knowledge have been already pointed out; and it is admitted by our author himself, that "they are," in the other states at least, "familiar with the technicalities of the law."

But supposing books to be necessary for the information of the people on this subject, which I am not disposed at present to controvert, still we have not the least need of Mr. Livingston's code for that purpose; for it is easy to point out a single volume, and that not a large one, in which Mr. Livingston

will find none of that "disgusting verbosity," which seems so greatly to offend him, and in which the whole body of the criminal law is laid down and illustrated in a manner more scientific, more correct, and consequently the information to be derived from it is far more valuable, than all that is contained in his whole code, and all his reports put together. That volume is the 4th of Blackstone's Commentaries, a work which I have seen translated, and printed in the French language. All the means of information that can be given them, are already in the hands of the people, and that in a language they *can* and do understand; so that Mr. Livingston may lay by his ponderous load of "voluminous reports," and let them rest quietly on their shelves. They are quite harmless in this controversy.

Our author next attacks us from another quarter. In p. 11, he says the common law has undergone numerous changes, made in it by the English statutes which are not in force in this state; and that the common and statute laws of England have thus become so blended together, that it is impossible to distinguish what is common, from what is statute law; and that hence it is impossible for us to know what our law is. The answer to this is short and decisive. The fact is otherwise. All the writers upon the common law are careful every where to note every change of this kind that has been, at any time, made in that law; so that there exists not the slightest difficulty of this kind. In the very case he cites from, (Martin's Reports) the discrimination was made without the least difficulty, by the means I have just pointed out.

And now comes his heavy fire. "Supposing," says he, p. 12, "this difficult task accomplished, and

that we have reduced the latter" (the common law) "to its primitive simplicity, by stripping off the statutary shreds and patches by which it was disfigured, or adorned, what have we to reward us for our pains? First, we have the *benefit of clergy*, which assures impunity to every one who can read; for none of our statutes have taken it away. Next, the right of appeal in felony; and as a consequence of appeal, the trial by *ordeal and battle*, for although you have established the trial by jury, so had the common law, and much in the same manner that you have done, at the option of the party. You have the right of *sanctuary*, by which every offender who can escape to a church, or church-yard, is protected from arrest, and may *abjure the realm*. You have the right of *approvement*, by which every criminal who can, in a judicial combat, knock out the brains of his accomplice, secures his own pardon. You have the whole doctrine of outlawry, and other incidents to criminal proceedings, which no advocate for the present state of things understands, or would venture to contend for if he did; but which they cannot avoid, and must practice, if the law is to be executed according to its plain letter. The judges therefore must dispense with it, and do this to the degree only that they think fit in each case. The court, not the general assembly, must legislate, and they must legislate after the fact."

Here is a formidable appearance of a host, mustered up in *battle* array against us. But let us look at them a little more closely. Every one of them has on him a counterfeit uniform; and they are marching under false colours without any commission from lawful authority. They are, in fact, a set of old disturbers of the peace, who have been long since banished for their misdeeds;

and are now called back just to make a show and frighten us; and make us stand off, while their leader pulls down the house we are living in. But we need not be afraid of them; for they will be easily driven off again.

To drop the metaphor: we shall afterwards see, that these old exploded doctrines have never been adopted into our law; and we shall see also that Mr. Livingston's account of them is very far from being correct. But even admitting, for argument's sake, that they had been unwarily adopted, for no legislature could ever think of designedly adopting them, the remedy is easy. Let them be abolished, which may be done by a statute of half a dozen lines, and the work is done. The system is every way complete without them. Not one of them has ever been received in practice, nor has the want of them ever been in the slightest degree felt. And yet, in order to get clear of these imaginary evils, Mr. Livingston would have us tear down and destroy our whole system of criminal jurisprudence, which long experience has proved to be so excellent: and for what? That we may put our lives, our liberties, our fortunes, and our reputations at stake, on the experiment of his new and untried code, the effect of which cannot be known until the experiment is made. We are safe under our present system: then why put all to hazard on an experiment so full of danger? Surely no folly can be greater.

Having fired this heavy discharge, our author proceeds to reload his artillery with Spanish ammunition, and fires another discharge still more heavy. He now calls in the Spanish laws to his aid, and argues that there is a dangerous mixture of Spanish criminal law in our

system. Another new discovery this, for which I believe we are entirely indebted to him.

His argument, in substance, is, that the Spanish criminal law being in force before and at the time this country was ceded to the United States, was, by the laws of nations, continued in force, until altered or abrogated by the new sovereign, who took possession of the country: that our statute of May 4th, 1805, "for the punishment of crimes and misdemeanors," did introduce the common law in part, and so far abrogated the Spanish criminal law: but that act confines the applicability of the common law to the offences provided for by the same act; so that it cannot be applied, in the prosecution of any other offences whatever. But there were many offences which were punishable by the Spanish criminal law, besides those provided for by that act; and which, as the Spanish law still remained in force, with respect to them, still continued punishable by its provisions. Whence, he argues, it resulted, that the common law was in force as to some offences, and the Spanish law as to others; which produced a mixture of contradictory rules of law, and a state of confusion that never can be endured. It is true, he admits, that our statute of 3d July, 1805, by its third section, provides, "That all other crimes, offences, and misdemeanors committed by free persons, and not provided for by this act, nor by the act to which this act is a supplement, shall be punished according to the common law, and shall be prosecuted and tried according to the said law, in the manner, and according to the forms prescribed by the act entitled 'An act for the punishment of crimes and misdemeanors.'" This provision, Mr. Livingston admits, introduced the whole of the com-

mon law in criminal cases, and consequently abrogated the Spanish criminal law, and thereby removed the evil. But this third section of the act of 3d July was afterwards repealed by the act of 2d May, 1806: and this repeal he thinks abrogated all that part of the common law, which had been introduced by the repealed section, and restored the Spanish law to the same extent, and thereby introduced again the same dangerous mixture of common and Spanish criminal law, which is before noticed; or at least, that it has thrown this part of our law into such doubt and uncertainty, as to call loudly for the interposition of the legislature. But as the constitution forbids the legislature to adopt any system of laws by *a reference thereto*, no remedy now remains, but that of enacting specially all the provisions required to supply the defect. And to show the extent of the evil, he produces a long list of crimes which have been created by our statutes since the 4th May, 1805, which, on the principles he lays down, come within the mischief of those conflicting provisions of common and Spanish criminal law.

This I believe is a correct statement of his argument, the substance of which I have endeavored to collect and state in this form, because of its being too long as contained in his report, to be quoted at length.

Before I proceed to answer this argument, I deem it proper to observe, that when I wrote my strictures, I was under the same mistake that Mr. Livingston appears to be under in this argument, to wit: that the act of May 4th, 1805, was "the foundation on which that part of the common law rests which is in force in this state." I came into the state in 1810, and found the criminal law then settled, as it has been acted upon ever since; and did not take the

trouble to examine thoroughly the foundation on which it depends, until I was led to do so by the objection Mr. Livingston here produces. My examination of it has now led me to proof, that the law had been correctly settled.

The common law does not rest *solely* on the two acts of our territorial legislature, of May 4th and July 3d, 1805, as I shall now proceed to show.

By the act of congress, "erecting Louisiana into two territories, and providing for the temporary govenrnment thereof," passed March 26th, 1804, about three months after possession of the country had been taken by the United States, the legislative council of the territory of Orleans was formed; and it was by that legislative council that the two acts of May 4th and July 3d, 1805, were passed, by which the common law was introduced. That act of congress did not introduce the common law; but by its eleventh section it provides, that "the laws in force in said territory at the commencement of this act," (which were the Spanish laws,) "and are not inconsistent with this act, shall continue until altered, or repealed by the legislature."

A pressing object of duty for the legislature thus formed, was, to provide a system of criminal law; which might relieve the people from the barbarous and tyrannical operation of the Spanish criminal law. They accordingly passed the act of May 4th 1805, the 33d section of which provides, "That all the crimes, offences, and misdemeanors herein before named, shall be taken, intended, and construed according to the common law of England; and that the forms of indictment, (divested, however, of unnecessary prolixity,) the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of said crimes,

offences, and misdemeanors, changing what ought to be changed, shall be, except as otherwise provided for by this act, according to the said common law."

This section, Mr. Livingston contends, by directing the application of the common law to "the crimes, &c. *aforesaid*," confines it exclusively to those crimes; a position by no means to be admitted. For in this, and in subsequent acts of the legislature, there are clear indications that it has not been the intention of the legislature so to confine it. By the 51st section of this same act, the superior court is authorized to summon, "as heretofore, grand and petit jurors of the territory, for the indictment and trial *of any offences committed therein*," which extends that *common law method* of trial to *all offences* of every description. The act of March 16th 1810, prescribes the method of selecting jurors, and directs the "sheriff to summon them as *grand and petit* jurors, during" the session of the court. The act of 22d February, 1817, which creates a number of new offences, repeals "so much of the thirty-ninth section of the act" of May 4th, 1805, as "provides that it shall be the duty of the court, in all criminal cases tried by the court, wherein an injury to the person or property of any person has been sustained, and *in all such cases tried by a jury*, to direct such jury to inquire, at the prayer of the party injured, concerning the degree of such injury, &c." Here again the trial by jury, and consequently all the rules of the common law incident to that mode of trial, are clearly recognized as applicable to *other* criminal cases besides those provided for by the act of 1805.

Again, in the act of March 6th, 1817, the mode of summoning jurors is further provided for; and they are

to serve as "grand jurors," and "petit jurors, on the trial of such capital crime, &c."

Now, when it is considered, that from the time the common law was first introduced into the territory, down to the present day, the courts have constantly construed the statutary provisions of our law, as having extended the application of the common law to the trial of *all* crimes and offences punishable by our law, without distinction; that the legislature, *with full knowledge of this*, have, from time to time, given to it their approbation and assent; legislating upon it as *the settled law* of the state. And when it is further considered, that the opposite construction would really have produced all the mischief Mr. Livingston only imagines to exist; when all this is considered, can there be a doubt remaining, that the construction the courts have given to those statutary provisions, is the true one, and that it has actually received the sanction of the legislature?

The reader will perceive that I have hitherto grounded my argument solely on the statutes of the territory, and of the state. The argument does not stop here. We have seen, that by the acts of May 4th and July 3d, 1805, the common law was introduced and extended to *all* criminal cases whatsoever; while at the same time, under the act of congress before noticed, the Spanish law still remained in force in all *civil cases*. This was the actual state of our laws, when the act of congress, "further providing for the government of the territory of Orleans," went into operation; which I apprehend it began to do, when the government under it was completely organized; and the legislature met on the 25th day of January, 1806.

By the first section of this act of congress, it is provided, "That the president of the United States be,

and he is hereby authorized, to establish in the territory of Orleans, a government in all respects similar (except as herein otherwise provided) to that now exercised in the Mississippi territory; and shall, in the recess of the senate, but to be nominated at their next meeting for their advice and consent, appoint all the officers necessary therein, in conformity with the ordinance of congress, made on the thirteenth of July, one thousand seven hundred and eighty-seven; and that from and after the establishment of the said government, the inhabitants of the territory of Orleans shall be entitled to, and enjoy all the rights, privileges, and advantages secured by the said ordinance, and now enjoyed by the people of the Mississippi territory."

The 4th section of this act provides, "that the laws in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force until altered, modified, or repealed by the legislature.

Now, we have just seen that the territorial acts of July 3d and May 4th had completely abrogated the Spanish criminal law, and introduced the common law in its place, when this act of congress came into operation. The common law was then in force, and this fourth section of the act of congress consequently operated to continue that law in force: so that from thenceforth the continuance of the common law in force, no longer depended on the territorial statutes, but on this act of congress. The repeal of the third section of the act of July 3d, 1805, did not, and could not, repeal this section of the act of congress, and consequently the common law then in force, is continued in force by it, notwithstanding that repeal; except so far as it may have been after-

wards altered by *special provisions* contained in our statutes.

Other provisions of the act of congress are to the same purpose. It established a government in the territory of Orleans, *similar in all respects* to that which was then exercised in the Mississippi territory; and if similar in all respects, then similar *in all its laws*. But every one knows, that the common law was then in force in the Missisippi territory, both in civil and criminal cases. The conclusion is plain. The common law was introduced, and put in force, as well as continued in force, by this act.

And again: The ordinance which was introduced and inforced by the same act of congress, provides, that "the inhabitants of the said territory shall always be entitled to judicial proceedings, according to the course of the common law." Now, *judicial proceedings*, taken in the unlimited sense in which the terms are here used, include *the whole administration of justice;* and this includes *the whole body of the law*. But all this is to be *according to the course of the common law*. The common law then was clearly introduced by the ordinance, and that in civil as well as in criminal cases. If this be so, it will be asked, how came the Spanish laws to remain in force in civil cases? It was evidently in virtue of the same fourth section of the act of congress. The Spanish *civil law* was then in force, as the common law was in *criminal cases;* and this section attached upon both as they then were, and continued them in force; or at least left it to the option of the territorial legislature to retain their ancient *civil laws* if they chose to do so. But it seems to have left no such option as to the criminal law. All its provisions in this respect are in favor of the common law

Let us now see what was the effect of the repeal of the third section of the act of July 3d, 1805. That section, we have seen, provided, "that all other crimes, not provided for" by that act, nor by the preceding one, "shall be punished according to the common law, and shall be prosecuted, and tried according to said law." This is repealed: but we have just seen that the act of congress remained in force, and preserved the common law from being abrogated by the repeal. Was it then to have no effect? Yes, certainly; it was to have some effect: and its just and legitimate effect was, that which the courts have given to it, to wit, that from the time of the repeal, no act which is a crime *merely by the common law*, can be punished; and no crimes by the Spanish law, having any existence in the state, that law being clearly abrogated, it has hence come to be the settled doctrine of our law, that *no act* can be punished *as an offence*, but such as are made punishable by our statutes. But there is nothing *express*, either in the repealing act, or in the section which is repealed, to give it even this effect; and it has been given to it merely by *implication*; the intention of the legislature, that thenceforth no *mere common law crimes* should be punished as such, being strongly *implied* in the repeal of that provision, by which their predecessors had directed such crimes to be punished. But the rules for the prosecution of those crimes, being identically the same, which they had preserved in force in cases punishable by the former statute, the *implication* fails with respect to these; especially when it is recollected that these same rules make a part of the common law which is preserved in force by the act of congress.

Such is our system of criminal law, and such the foundation on which it rests. And if this be so, it cuts up by the roots Mr. Livingston's grand objection, founded on the supposed dangerous mixture of Spanish law in our system, as well as several others which will be noticed as we pass along.

Let us now return to the *benefit of clergy*. This old doctrine is curious. "Clergy," says Blackstone, "or, in common speech, the *benefit of clergy*, had its original from the pious regard paid by christian princes to the church in its infant state, and the ill use which the papish ecclesiastics made of that pious regard." "The exemptions which they granted were principally of two kinds. 1. Exemption of *places* consecrated to religious duties from criminal arrests, which was the foundation of sanctuaries. 2. Exemptions of the persons of clergymen from criminal process, before the secular judge, in a few particular cases, which was the true original of the *privilegium clericale*."

"But the clergy increasing in wealth, power, number, and interest, soon began to set up for themselves, and that which they obtained by the power of the civil government, they now claimed as their inherent right; and as a right of the highest nature, and *jure divino*. By their canons, therefore, and constitutions, they endeavored at, and where they met with easy princes, obtained a vast extension of their usurpations; as well in regard to crimes, of which the list became quite universal, as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church, but many that were totally laymen."

"In England, however, although the usurpations of the pope were many and grievous, until Henry the eighth entirely exterminated his supremacy, yet a total exemption of the clergy from the secular jurisdiction, could never be thoroughly effected, though often endeavored by the clergy; and therefore, though the ancient *privilegium clericale* was, in *some* capital cases, yet it was not *universally* allowed." This shows how loose Mr. Livingston is in his account of this doctrine, when he says it "assures impunity to *every one* who can read."

"And," says the same author, "it is to be observed, that neither in high treason, nor in any mere misdemeanor, was it indulged at common law, and therefore we may lay it down as rule, that it was only in petit treason, [the murder of a superior by an inferior person,] and in capital felonies, which for the most part became legally entitled to this indulgence by the statute *de clero*, 25 Edward third, which provides that *cleres*, [i. e. clergymen] convict for treason, or felony, teaching other persons than the king, or his royal majesty, shall have the privilege of holy church." Here, then, we have traced this alarming *benefit of clergy* to its source, and find that it was grounded on an English statute. But Mr. Livingston insists, I think correctly, that no English statute is in force with us; and if not, then the benefit of clergy is not in force.

On another ground, too, it would be found that we have no benefit of clergy with us. The claim we see was allowed to none but such as were either real clergymen, or those persons who were reputed such; and in those dark ages, to be able to read, was taken as sufficient evidence that the party who could read

was a clerk, or clergyman; and on giving this proof, he was discharged from the secular jurisdiction.

But the party was not thereby *acquitted of the crime* charged against him. He was merely delivered over to the ecclesiastical jurisdiction, where he was to undergo another trial for the same offence. The claim, therefore of the benefit of clergy, was a mere *declinatory* plea—a plea *to the jurisdiction* of the secular court. Now, it is one of the best established rules of the common law, that every plea to the jurisdiction of any court of general jurisdiction, must show that some other court has jurisdiction of the cause.

But in Louisiana we have no such other court. We have no such courts of ecclesiastical jurisdiction as this plea would compel the party to allege; and therefore no such plea could be allowed. Ecclesiastical courts, with powers like those which enabled them formerly to claim and obtain this mischievous privilege of clergy, are the creation of a religion established by law, which tolerates no other, and of that unnatural union of church and state, which, for so many ages, proved so great a curse to mankind. But happily, in this state, they have been put down by the act of congress before noticed, which restored to the people the liberty which is their inherent birthright, of worshiping their God according to the dictates of their own conscience.

The ordinance of 1787 secures this. It ordains that, "The following articles shall be considered as articles of compact between the original states, and the people and states in the said territory, and forever remain unalterable, unless by common consent, to wit:

Article 1. No person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments in the said territory." This cuts up another of Mr. Livingston's objections to "the present system." It secures this important right far better than his code could secure it, since it is "unalterable unless by common consent."

If it be said that the benefit of clergy existed in the Mississippi territory, and on my construction of the act of congress, it must have been introduced into this state by that act, I answer: Admitting this, it is something totally different from what Mr. Livingston represents it to be. *There* it was altered by statutes, so as to exempt the criminal from the punishment of death for the first offence only; for the second, he was to be executed: but for the first offence he was to be burnt in the hand; so that there it was really a species of punishment, instead of being a means which "assures impunity to every one who can read." But admitting it to have been introduced in this form, it has never been allowed in this state, and, I apprehend, has been considered as excluded by the same statutary provisions, which exclude all punishments but those prescribed by our own statutes.

And now the reader will perceive, that as this *benefit of clergy*, in the only form in which it is possible to find any place in our system, being really *a species of punishment*, I might have dismissed it, as not coming within the plan of these remarks: and I should have done so, had not Mr. Livingston produced it in such a dark and questionable shape, as

to induce his reader to believe that it is something highly mischievous; but without telling him what it is.

Next comes "the appeal in felony, and as a consequence of appeal, the trial by *ordeal* and *battle*;" and next, "the right of *sanctuary*." I confess I was not a little surprized to find it gravely asserted in this report, that all these have been adopted into the laws of this state; more especially the three last of them. These three, as every body knows, are not only absurd, but highly unjust and iniquitous. They are some of the remains of those old absurdities, which arose during the dark ages of ignorance and unbounded superstition, and found their way, not only into the English law, but, I believe, into the laws of every kingdom and state of Europe; but which the better information of modern times has banished, I believe, from almost every code of laws. It would therefore be exceedingly strange, to find them adopted by the legislature of Louisiana, in the beginning of the nineteenth century. In fact they are not adopted.

I might content myself with simply denying that these old absurdities have been adopted into our law, and calling on Mr. Livingston for proof; for he has given none. But I will not rest the point on that; I will proceed to show that they are not adopted.

In the first place, then, these doctrines *make no part of our ancient laws;* and consequently cannot be in force, unless they are inforced by some positive provision of our own statutes.

Secondly: They are not *expressly* mentioned as being introduced in any of our statutes; and therefore they cannot be considered as in force: for,

1. We are not at liberty to presume, nor even to admit, that the legislature, in passing any act intended to do an *absurd* or *unjust thing*, unless they have mentioned, in *express terms*, the thing they did intend. But nothing can be more absurd and unjust than these old doctrines are. Therefore, as they are not *expressly* mentioned, they are not introduced.

2. They cannot be brought within the fair meaning of the words of any one of our statute laws; not within the act of congress; for that introduces a government "similar in all respects" to that which was then *exercised* in the Mississippi territory. Now, every body knows, that not one of these doctrines ever was used or *exercised* in that territory.

3. Nor can they be brought within the meaning of the 33d section of our statute of 1805; not within the clause which directs that "all the crimes, &c. therein named, shall be taken, intended, and construed according to the common law;" for that is a very different thing: nor in "the forms of indictment;" for this also is a different thing. Are they included then in the terms, "the method of trial?" Not so. The noun *method*, in this clause, is in the singular number, and clearly indicates that the intention was to introduce only *one* of the common law *methods* of trial. Had more than one been intended, they would have put the noun in the plural—*methods*. As it is, the clause will not admit of more than one, without doing violence to its grammatical meaning: and what method of trial they did intend, is clearly indicated by the reference to "the forms of indictment." Nor can they be intended by the reference to "the rules of evidence;" nor by that to "all other proceedings whatsoever, in the prosecution of the said crimes;" for the word "other" clearly

distinguishes these from the "method of trial," which is specially mentioned.

4. Nor can they be intended by the ordinance; for, taking that with the act of congress which inforces it, it introduces *judicial proceedings according to the course of the common law* precisely as they were in the Mississippi territory, where, we have just seen, none of these doctrines existed.

As to the appeal, if it be at all in force, which, however, is by no means to be admitted, it is rendered perfectly harmless. It is a species of "criminal prosecution," carried on "by a private subject demanding punishment on account of the particular injury suffered, rather than for the offence against the public, which is indulged in a few cases only;" (4 Blackstone, 312,) and its effect, on conviction, is precisely the same as in a prosecution by indictment. In this, then, (supposing an appeal to be brought) the trial must still be by jury; for we have just seen, that the trial by *ordeal*, and by *battle*, are out of the question; so that there is no danger of any knocking of brains out, as Mr. Livingston is pleased to suppose. Nor is there any danger of a prosecution by appeal, after an acquittal on indictment; for the common law itself, as well as the constitution of the United States, forbid that. The appeal then can do no harm.

Next comes what Mr. Livingston calls "the *right* of approvement." This is not a *right*. It is a "species of confession." "And that is, when a person indicted of treason or felony, and arraigned for the same, doth confess the fact, before plea pleaded; and appeals, or accuses others, his accomplices in the same crime, in order to obtain his pardon. In such case he is called an *approver*, or prover, *probator*, and the party appealed

or accused, is called the *appellee*. Such approvement can only be in capital offences," (not, as Mr. Livingston says, by "any criminal,") "and it is, as it were, equivalent to an indictment, since the appellee is equally called on to answer :" and if condemned, "the approver shall have his pardon *ex debite justitiæ*." But if the appellee be acquitted, "the approver shall receive judgment to be hanged, upon his own confession of the indictment." 4 Blackstone, 330. "But," the same author immediately adds, "it is *purely in the discretion of the court* to permit the approver, thus to appeal, or not; and, in fact, this course of admitting approvements hath been long disused;" on account of the "false and malicious accusations of desperate villains," brought against innocent persons. It is then merely *an authority* vested in the court to permit this proceeding, or not, at their discretion, and not, as Mr. Livingston represents it, a *right* given to any criminal," to knock out brains in order to save his own neck.

But the same arguments before advanced, prove equally, that neither is this doctrine of approvement adopted by our statute law. It commences, we see, in the confession, by the approver, of the indictment against himself; which terminates that prosecution; and then commences another form of prosecution against other persons, not by indictment, but by appeal; and that at the suit of a villain, who has already confessed himself guilty of a capital crime. Such a kind of prosecution is so palpably absurd and unjust, that it never can be considered as adopted by any statute in which it is not *expressly* mentioned, which it is not in any one of the statutes in force in this state. Nor can it be brought within the fair meaning of the words of any of them.

The mode of prosecution by "indictment," is *expressly* mentioned and adopted. It is the only one so mentioned, and *expressio unius, est exclusio alterias*—the expression of one is the exclusion of all others. Besides, the introduction of *one* mode of prosecution, fully answers to the meaning of the statute. It seems to me therefore impossible, that any court of this state should feel itself warranted in putting any man to answer, and put himself upon his trial, on a prosecution of this kind.

The doctrine of *outlawry* remains to be disposed of. Mr. Livingston produces it as something very alarming, but still without showing how it is in force, if it be so; or telling us what it is. "None of the advocates for the present state of things," says he, "understands it, or would venture to contend for it if he did." Does he understand it himself? Does he know what are its effects? If not, how comes he to be so sure, that none of us understand it? If he does, he would have obliged us by informing us wherein the great difficulty of understanding it lies. We might then have been better convinced, than by relying on his bare assertion.

Let us however, if we can, find out what this mysterious doctrine is. Blackstone shall inform us, vol. 4, page 318. After describing the process which usually issues to bring in an offender, to answer to an indictment found against him, that writer says, "But if he" (the offender) "absconds, and it is thought proper to pursue him to an outlawry, then greater exactness is necessary. For, in such cases, after the several writs have issued in a regular number, according to the nature of the respective crimes, the offender shall be put in the *exigent*, in order to his outlawry, that is, he shall be exacted, proclaimed, and required to surrender, at five County Courts; and if he be returned *quinto ex-*

actus, and does not appear at the fifth exaction, or requisition, then he is adjudged to be outlawed, or put out of the protection of the law; so that he is incapable of taking any benefit of it in any respect, either by bringing actions, or otherwise. "The punishment," he adds, 'for outlawries upon indictments for misdemeanors is: forfeiture of goods and chattels. But an outlawry in treason, or felony, amounts to a conviction, and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by the country. His life, however, is still under the protection of the law." But "if any single minute point be omitted, or misconducted, the whole outlawry is illegal, and may be reversed: upon which reversal the party accused is admitted to plead to, and defend himself against the indictment."

Now even supposing this doctrine to be in force in this state, which however is by no means to be admitted, still, I confess I am not able to see any thing so very mischievous in it, as it will be found modified in our law: For first, The forfeiture is taken away, by our statue of 1805, for all the offences provided for by that act, and for all other crimes, by the same provisions which have abolished all punishments by the common law; for forfeiture is either the whole, or a part of the punishment. 2nd, It can be used against none but offenders *who abscond*, and flee from justice; and consequently no man who submits to the laws of his country, can be at all affected by it. 3rd, It never can be employed at all under our system, for want of the "County Courts," in which the offender is required to surrender himself. We have no such courts, and we have just seen, that the least failure, in the most minute point renders the whole outlawry illegal: and therefore,

as the legislature have not provided the means of using this process, the process itself is not adopted. 4th, It is never used in our criminal jurisprudence, indeed we see that it cannot be used; nor is there the least necessity for using it. The system is full and complete without it. And 5th, If it could be used at all, it is entirely in the descretion of the attorney for the state, and not at all in the direction of the court, whether it shall be used or not. And yet, Mr. Livingston thinks himself warranted in saying, "The Judges therefore must dispense with it, and do this to the degree they think fit in each case. The Court, not the General Assembly, must legislate, and they must legislate after the fact!"

This unwarrantable charge he repeats, and it will be afterwards noticed. Meantime I think I may conclude, that this whole catalogue of defects, which he has painted in such frightful colors, amounts to nothing. If a doubt remain, let all those old remains of the dark ages be declared by a statute to make no part of our law: abolished, is a term I do not use, because these old doctrines do not exist in our law; and consequently they afford nothing to abolish. It will not, as before observed, make the slightest breach in the system; which is absolutely entire, and complete without them. They do not therefore afford even the shadow of an argument, for tearing that system up by the roots, in order to make way for Mr. Livingston's code.

In his eagerness to bear down all opposition to his code, Mr. Livingston now shifts his attack, and directs his whole force against the courts and the judges. "The legal conclusion," says he, "is that the existing laws were intended to govern in all cases where they had not been abrogated. In that case, we should have to consult the Spanish authorities, for the definition of

offences, and the rules of evidence, and for the mode of prosecution, so far as was compatible with the other provisions of the constitution and statutes of the State. Yet this has great, perhaps insurmountable difficulties. To avoid these difficulties recourse has been had, under the plea of necessity, to the assumption of legislative power by the courts. They have, without scruple, and without being questioned, applied the 33d section of the act of 1805, to all subsequent penal laws; they have restored the 3d section of the second act, which the legislature repealed, and have defined and tried all offences indiscriminately according to the common law. It will not, it is presumed, be denied, that the introduction of this section into the act, was the exercise of legislative power, necessary in order to the application of the common law to the offences ennumerated in the statute. If so, it follows, that nothing but the exercise of the same power could legally apply it to offences not ennumerated in that act. But it has been so applied to the other offences by the judiciary; therefore the judiciary have exercised legislative power. But the constitution has expressly forbidden, both by affirmative precept, and positive prohibition (in the most precise terms the language could afford) any such exercise of power."

Here Mr. Livingston has thought fit to charge the judges with a political offence of no ordinary share of guilt; nothing less than their having usurped legislative power, in direct violation of the constitution, and in violation of their oath of office, which binds them to decide in all cases "according to the rules and regulations of the constitution and laws of the state,"—an offence not only exceedingly dangerous to the rights and liberties of the people but one which includes in it the guilt of moral perjury! As I have the honor to stand in that relation, which makes me one of the accused, I presume

it will be expected that I should make some kind of answer to this charge; coming, as it does, from a lawyer of high standing, who is also a Senator of the United States. My answer then will be the same that was given in ancient times, by a wise and good man to a false accuser, "There are no such things done as thou sayest, but thou feignest them out of thine own heart,*

And to show how utterly groundless, and unwarrantable the charge is, I observe—1. "The fact on which he grounds it is not true. He grounds it on the supposition that the two statutes of 1805 are the *sole* foundation, on which the common law rests in this state, which is not the fact; for, in the preceding pages, we have seen, that that system of laws was also introduced and enforced by the acts of congress, which remain yet unrepealed in this point: so that the repeal of the third section of the territorial act did not, and could not abrogate the common law, which was then in force. 2. It is therefore not true, that the courts have" restored the third section "of the act of 1805, which the legislature repealed;" but they have considered the common law as in force by the acts of congress; and the act of the 4th May, 1805, independently of the repealed section, in which we have seen that they were right. In applying the common law "indiscriminately" to the definition and trial of "all offences," they have done what it was their duty to do. 3. Instead of restoring the repealed section, we have already seen that they have given to the repeal all the effect that it was possible to give it, without violating the acts of congress; for it is on that ground alone that they have held, that no crime could be punished, but those provided for by our own statutes.

* Nehemiah, 6. 8.

And lastly, in the construction of the acts of congress, and our own statute, the question necessarily arose, how far these had abrogated the Spanish and introduced the common law? which is, in its very nature, a *judicial question*, to be decided by the courts, and by them only. This they have decided, and it is all they have done in this matter: so that it is impossible that there should be any "assumption of legislative power by the courts" in the case.

I have not overlooked what our author says, in a note on p. 60 of his report. "What is meant," says he, "by this and similar observations in this work is, that the laws themselves are in such a state, composed of such heterogeneous materials, drawn from such obscure sources, so confusedly put together, that it is impossible for the most assiduous application, and the quickest apprehension to master them." This may serve well enough as an explanation of what is said in the page to which the note is annexed; but does it offer any explanation of this charge against the judges? Would any one of them be permitted to excuse himself, by saying, I found the law "composed of such heterogeneous materials, drawn from obscure sources," and so confusedly put together," that I could not "master them," and therefore I "assumed legislative power," and proceeded to *make* law, and "restored" the third section of the act which the legislature repealed? Such a plea would but aggravate the offence, as it does the injury of the accusation, rather than excuse it. Besides, the fact itself of this plea would be false. Our laws are not "composed of such heterogeneous materials," nor in that confused state which it asserts.

One other supposed defect in our present system will close the list, of those urged by Mr. Livingston, in

the first division of his report. It relates to homicide, and is in p. 37. To understand what this offence is, he says, "The only guide, for a large majority of the people, is the French version of the law," i. e. of the act of 1805. "They there find that one" (of the two crimes of murder and manslaughter) "is *homicide prémédité*, and the other *homicide non-prémédité;* according to which, the justifiable homicide of a public enemy would be punished with death; and the accidental shooting of a friend, might incur imprisonment at hard labour, for twelve years: reason would revolt at this, &c." Even so. But if he had added, that these words are nothing more than the terms chosen by the French translator of the statute, by which he translates the words *murder* and *manslaughter*, into his own language; that they were never intended as *definitions* of those crimes; that the act refers to the common law for their definitions; that the 48th section of the same act, authorized the governor, to "cause to be drawn up, and printed and promulgated, in the English and French languages, an *exposition* and *explanation* of each and every of the crimes and misdemeanors, herein before mentioned, which are not herein precisely defined, and the rules of evidence, the mode of trial, and forms of writs and indictments, and all other proceedings, as they are directed to be had in the thirty-third section of this act;" that this exposition was soon afterwards drawn up, by Lewis Kerr, Esq. in an able manner, and published in the English and French languages. Had Mr. Livingston mentioned all this, he would have stated the whole of the case fairly, and shown that these two expressions *are* not "the only guide for that large and respectable part of the people of this state, to whom he alludes: he would have shown, that precise information on this subject was

printed and published to them, more than twenty years ago. I confess it appears strange to me, to find a man of our author's talents and experience, gravely advancing such an objection as this is.

Since I have been thus led to notice an objection on the subject of homicide, I will here consider another part of his report, and dispose at once of this part of the subject. Whoever will reflect on the act of homicide, or the killing of a human creature, will quickly perceive, that it is, *in its very nature*, either *justifiable*, *excusable*, or *criminal*, according to the circumstances accompanying the act; and that every degree of guilt, of which it is at all susceptible, is stamped upon it by *the laws of nature*, anterior to, and independent of all human laws concerning it. These degrees of guilt, are what the Great Author of nature has been pleased to make them, and no human laws can change them, or make them any other than what they are. Human legislators may attempt to change them, and may prescribe different degrees of punishment, according to the divisions they may make of the offence; but just in proportion as they deviate from the distribution of guilt, or innocence, made by the superior laws, the laws of nature, such human laws will be found unjust in their operation. It is then the business of human laws to conform to the laws of nature, on this important subject. To illustrate this, let us suppose, for a moment, that a law were passed, making homicide, which is excusable in self-defence, punishable with death; and exempting murder from all punishment. All mankind would, without hesitation, pronounce such a law to be unjust. Why? Because the real guilt of one of these acts, and the innocence of the other, remain the same, without being in the slightest degree changed by the law.

In the new code this principle is violated, and injustice is the necessary consequence. Mr. Livingston complains of our present law, and says it "confounds voluntary and involuntary homicide in the same name, and applies the same punishment" in the case of manslaughter. I answer, in this it follows nature, and confounds nothing. It defines manslaughter to be of two kinds: 1. *Voluntary*, which is "the unlawful killing of another without malice, either express or implied; and 2. *Involuntary*, which is where the killing happens in the commission of some unlawful act.

Now it is the *degree of guilt*, that must determine the grade of offence, which is to be assigned to any case or description of homicide; and this can by no means be determined by the single circumstance of its being voluntary or involuntary. The guilt depands on a great variety of other circumstances besides this. In the *voluntary* kind of manslaughter, where the killing is done suddenly in the heat of passion, it obviously depends on the circumstances of the *provocation*, by which the passion is excited; and these, every body knows, may be so diversified as to produce every shade of guilt of which the offence is susceptible. The provocation may be so great, and the assault so violent as to take away all guilt, and reduce the offence down to homicide excusable *se de defendendo*, in self-defence: or it may be so slight as to raise the offence up to manslaughter, and even to murder itself.

Take the *involuntary* kind, and the result will be the same. This will be illustrated by the case of the workman throwing down a piece of timber into the street; "This," says Blackstone, may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act is done. If it were in a

country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only, but if it were in London, or other populous town, where people are continually passing, though he gives loud warning, it is manslaughter, and murder if he knows of their passing and gives no warning at all, for then it is malice against all mankind."

Thus it is clear, that the degree of guilt never can be determined, by the single circumstance of the homicide's being voluntary or involuntary.

Now, in both these kinds of homicide nature gives two, and only two marks of distinction, by which the different degrees of guilt may be determined, so as to establish different grades of offence. *Malice* in the act is one of these, and is that which distinguishes manslaughter from murder. In the descending scale, the mark of distinction is this: in the voluntary kind, there must be "an apparent necessity for self-preservation to kill the agressor," to reduce it below manslaughter; for if no such necessity appear, it will be manslaughter. In the involuntary kind, the mark of distinction is, that the lower grade happens in the doing of *a lawful;* the higher in doing *an unlawful* act.

By these the distinct grades of *excusable homicide* and *manslaughter* are established; and between these there will not be found in nature, a single circumstance, which can serve as the foundation of any intermediate distinct grade of offence. Any attempt, therefore, to establish such intermediate grades, will be found to be a deviation from the order of nature; for which she is ever sure to make us pay the penalty, in the injustice which results from every such violation of her laws.

Yet, in his code, Mr. Livingston undertakes to establish no less than three distinct, intermediate grades,

of what he calls "negligent homicide," between those of *excusable homicide* and manslaughter. And, in order to provide materials for these, he takes away from excusable homicide the *voluntary* kind of it, which is in *self-defence*, and assigns it to his new grade of the offence: thus inflicting punishment on acts which nature declares *excusable*, and sometimes even justifiable! And from manslaughter he takes away the *involuntary kind*, and assigns it to the same new grades of "negligent homicide;" and thus assigns to this inferior grade, cases which often amount to malicious murder! See all this pointed out and demonstrated, in my strictures, by arguments which Mr. Livingston has not even attempted to answer.

We come now to consider the provisions of the code, in the important article of murder. He has changed his definition of this crime, from what it originally was, by incorporating into it the next succeeding article of his code; and it now reads as follows: "Murder is homicide inflicted with a premeditated design, unaccompanied by any of the circumstances which, according to the previous provisions of this chapter, do not justify, excuse, or bring it within some one of the descriptions of homicide herein before defined." And a little below, he gives the following rule for its application:—"An act of homicide occurs. Did the circumstances justify? Did they excuse it? Does it come within any of the descriptions of negligent homicide? Is it manslaughter? If either of these questions be answered in the affirmative, it is not murder." To which he adds: "By the new code, no jury can convict, no judge can condemn for murder, until they have carefully examined all the lighter shades of homicide, and are convinced that the circumstances do not bring the accused within any of

them. The form of the law imposes this obligation. It cannot be dispensed with; for there is no other description of the crime of murder, than that it is homicide, that it is not one of those before described." p. 154.

This rule agrees sufficiently with the definition; but it shows the definition to be absurd. It requires us, first of all, to enquire, not whether the accused be guilty of the crime that *is* charged against him; but whether he be guilty of one of five or six other offences, with which he *is not* charged! If this be not absurd, I demand to know what absurdity is. And in doing this, we are driven to find out the meaning, if we can, of no less than six new definitions, or descriptions of homicide, which do not exist in nature, as there described; definitions which I have elsewhere shown to be intricate, perplexed, and in some instances contradictory. And we are driven to find out all this, if we can, without the help of terms that have any settled meaning; for the new code, as I have also shown elsewhere, changes the meaning of all the law terms which have hitherto been employed in our law; and thus destroys every thing like certainty in their meaning! And when we have got through all this, as well as we can, does the code tell us what murder is? that we may have some criterion by which we may know, whether the case in hand be really a case of murder or not? No such thing. "There is no other description of the crime of murder, than that it is homicide, that is, not one of those before described." We are then driven to determine this awful question, by *inferring* from what the offence proved *is not*, that it is murder! This, in my view, is something worse than absurd—it is dangerous.

Mr. Livingston assigns a strange kind of reason for all this: "The advantage of this mode of description,

over that of a simple definition," he thinks "is evident; for should any words contained in that definition be liable to misconstruction, an act properly coming within the lower degree of that offence, might be brought within the definition of the higher." And what if some words in the definitions of the inferior grades of offence, should be liable to misconstruction? Would not the same consequence ensue? Certainly it would, just as much in the one case as in the other. Besides, how are we to know whether the *offence proved* comes within the inferior grade, but by the precision of its "simple definition?" In no other way can it be known, with any thing like certainty, in any case.

But by what circumstances in the *case proved* on the trial, are we to determine, whether it *differs* from the inferior grades of homicide? Is it by any circumstances *specified* in the code? or are we to take in any other circumstances at discretion, which we may think make the case to differ from them; on this the code is silent, except as to one thing; and that is the *premeditated design* required by the definition But the rule given does not confine us to this, and the definition leaves it very doubtful. But if this field be left open, we may find *constructive murder* introduced into our law by this definition!

Let us, however, take the definition on the ground that no case comes within it, but those in which "a premeditated design" is proved: and we shall find that it *may* still include in its meaning cases of *justifiable homicide;* justifiable, I mean, by the laws of nature; and we shall find further, that it excludes one whole class of cases of *wilful* and *malicious murder.*

I do not find by the report, that the author has made any change in his definitions of the inferior grades

of homicide; and if no change be made in any of these, then there will be found cases of premeditated homicide, which do not come within his definition of justifiable homicide, and which are, nevertheless, justifiable by the laws of nature; and being *premeditated*, they will come within his definition of murder. This will arise from his mode of defining justifiable homicide. This he has done by laying down no principle which may embrace within it the several cases of this grade; but by an enumeration of the cases which are to be considered justifiable. Now, every case not thus enumerated, does not come within his description of this grade of homicide; and then, by his rule, if it comes within none of the other inferior grades, and is premeditated, it is murder.

The case so often put, of two men being cast into the sea on a single plank, which is not sufficient to save both, and one of them designedly pushing the other off to save his own life, is precisely a case which, if not enumerated among his cases of justifiable homicide, will come within his rule, and be a case of murder under it: for, first, it does not come within his description of justifiable homicide, not being one of his enumerated cases. 2d, It is not excusable, for it is *designed*; and his definition of this requires, that it should proceed "neither from negligence nor design." It is neither of his "negligent homicides;" for all these are where the killing is "involuntary;" but the case in hand is one of *voluntary* killing. It is not manslaughter; for it is not "committed under the immediate influence of sudden passion." What is it then? It is "homicide, inflicted with a premeditated design," which cannot be brought "within" any one "of the descriptions of homicide before defined" in the code; and consequently is murder, according to Mr. Livingston's definition,

and his rule for applying it! This will not be the only case; for every case like this, that is not found enumerated in his enumeration of cases of justifiable homicide, will stand in the same situation.

Let us now try a case of real murder by his rule. It is one of those cases where *malice* is *implied* from the nature of the circumstances attending the act; as where a man kills another suddenly, without any, or without a considerable provocation." Here "the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight, or no apparent cause." This case is certainly not within his description of justifiable homicide; for that clearly excludes all homicide, even in self defence, unless the assault be so violent as to "give a just fear of death." It is not *excusable*; for the killing, to be excusable, must be such as "can neither be attributed to negligence nor design." It is not "negligent homicide;" for, as before noticed, all these are *involuntary* homicides; It is not manslaughter: for that must be committed under the immediate influence of passion, *arising from an adequate cause.* What is it then? Is it murder? No; for the killing was suddenly done, without any premeditated design! Nor can it be murder on account of the manifest malice in the act of killing; for malice makes no part of the definition. Can there be more required to fix the black seal of reprobation on this new code?

But this is not all. As the definition originally stood, no murderer could be condemned under it, without violating one of the most sacred principles of natural justice. This is demonstrated in my strictures in page 53, 54. The very same thing will result from the definition as it now stands.

To demonstrate this, let us here again suppose an indictment, drawn according to this definition, to be preferred. Mr. Livingston's own form of indictment, taken from his code of procedure, p. 232, shall furnish us the precedent. It is as follows:

"That J. S. on the day of in the year in the parish of S. with a premeditated design to kill one J. K., made an assault upon the said J. K. with a dirk, and inflicted a mortal wound on the left breast of the said J. K., of which wound he, the said J. K., afterwards, on the day of in the year aforesaid, died: wherefore the said jurors present, that the said J. S. the said J. K., in manner aforesaid, with a premeditated design, did kill and murder." This form of indictment, I believe, was drawn up before he made the change in his definition; but of this he cannot avail himself, since he himself tells us that the sense of the definition remains unaltered. "This description" (of murder, he says, Rep. p. 154) "was, as the projected code was first printed, contained in two articles. The sense was precisely the same, but the amendment consolidated and made it more concise." If "the sense is precisely the same," then the same form of indictment must still agree with it, as it did at first.

Let us now suppose the accused to appear in court, and confess this indictment to be true. Can he be condemned? It is most clear that he cannot, without violating one of the most sacred principles of natural justice, on which all our security depends. That principle of natural justice is, that *No man can be justly condemned unless it appear with such clearness and certainty that he is guilty, as to exclude the possibility of his being innocent.* Now we have just before seen, that cases of justifiable homicide, may come completely within the meaning of this new definition; so that

notwithstanding the confession of the indictment, the accused *may* still be an innocent man. To condemn him then, would be to violate the principle of nutural justice just stated. Into such dangerous straits are we sure to be led, when we deviate from the course which nature has pointed out. There is not in nature more than one criterion to be found, by which murder can be accurately distinguished from other homicide; and that is *malice in the act.* If we take this for our guide, our course is a safe one: if we deviate from it, nature has laid rocks in our way, on which we are sure to make shipwreck.

If a maniac or madman be capable of forming a "premeditated design to kill," as to me it seems perfectly clear that he is, and do actually proceed to kill a man, he may be hung as a murderer under Mr. Livingston's definition of that crime; though the universal sentiment of all mankind would pronounce him not guilty of any crime. This would clearly be so, for there is not a word in the indictment nor in the definition that requires the accused to have been of sound mind at the time of perpetrating the act.

But Mr. Livingston has undertaken to criticise the common law definition of murder, and asserts, that "there is scarcely a word in it, that, to a consciencious man, will not afford matter for serious doubt." This is another new discovery. That definition, which was formed at least as early as the time of Sir Edward Coke, since it is found in his writings; which, from that time to the present day, a period of more than two hundred years, has been in constant use, in all the courts, both of England and the United States; which has, during that period, come under examination, not hundreds only, but thousands of times, before courts composed of the

most learned, able, and upright judges; by opposing counsel, the most learned and able that have been found in both countries; and, during all that time, no fault has been found in it, until Mr. Livingston arose to make the discovery, and tell us that this definition is full of doubt and uncertainty!

Let us, however, follow him through his criterion. "The perpetrator," says he, "must be of *sound* memory and understanding. What scope does this give for equivocation. What a field does it open for inquiry. What has soundness of memory to do with the act? Be the faculty ever so imperfect, how does it affect the guilt? And as to discretion, if a sound discretion were necessary, no one could be guilty; for surely he commits the highest indiscretion who takes the life of another, and exposes his own, &c." *Of sound memory and discretion.* This is an *old English phrase*, introduced into the definition more than two hundred years ago, when the phraseology of the language was very different from what it is at present; and which, according to the usage of the language at that time, signified simply what we should now express by the words, *of sound mind*; i. e. capable of discerning between good and evil. This, not only *every lawyer*, but every man of common sense, knows to be the settled and universally received meaning of the phrase. It is not a *new phrase*, just now for the first time introduced into the law, without any settled legal meaning, as almost all the terms employed in the new code will be, if it should be adopted; but has the meaning just mentioned, settled, and fixed, not only by law, but by universal usage among the people. And the same thing is true, with respect to every word contained in this definition.

"The killing must be unlawful." This he admits, but desires his code to be received as the rule of unlawfulness. I think, however, we can do as well, in this respect, without his code: nay, better; for we have just seen what account we find in it of murder. "The person killed, to constitute the crime, must be a *reasonable creature*. Neither a newborn infant, nor an idiot, nor a madman, nor one suffering in the delirium of a fever, or stupified by opium or liquor, comes within this description, according to the plain meaning of the words." Perhaps not, in the new sense which he is pleased to put upon them. But in the old settled and universally understood meaning of the words, they signify simply *a human being*. *Reasonable*, is a term often employed in this sense, to designate *man* as distinguished from other *creatures*. *Man is a reasonable creature*, is a phrase very commonly used in this sense; and, as just observed, this is the settled legal meaning of the phrase in this definition. "Again," he asks, "who is in the king's peace?"—a frivolous question. He who is under the protection of the law, every one knows to be what is meant. But if it suits better, let it be expressed by the words, *under the protection of the state*, and the sense will be the same. "What is the malice *aforethought*? Is there any malice after thought?"—Another caviling question. Blackstone defines it to be *malicca præcogitata*—malice preconceived in the mind, before the act, and accompanying the act of killing; and this is universally known to be the settled meaning of the terms. "What is *express malice?* When shall it be *implied?*" he asks, as if no good answer could be given. Let me answer the questions for him. Malice is *implied* in the cruelty

of the act of killing a man suddenly, without provocation. It is *express*, when it is done by lying in wait, or has been previously threatened, and where there have been former grudges, and concerted schemes to do some bodily harm to the person killed. So much for this criticism, which I really should not have deemed worthy of any notice, had it not come from a lawyer of high standing in his profession.

Our author, notwithstanding his objections to this definition, "earnestly desires" that his own may be contrasted with it, and that one of them adopted, "which is the most clear and explicit;" i. e. he seems anxious, at any rate, that his code should be adopted. Let us then suppose the present definition to be adopted into his code; and at first blush it will appear to be at war with his whole chapter of homicide. In my strictures it is shown, that several cases are expressly stated in the code, as cases of "negligent homicide," which, if malice be the criterion of murder, are often cases of malicious murder. If, then, the present definition be adopted into the code, it will directly contradict those other provisions of the inferior grade of offences. Again, it will be at war with his code of procedure; for it is perfectly clear, that a form of indictment which agrees with his own definition, never can agree with the present one.

In the next place, it will at once set aside his rule, which sends us wandering through all the definitions of the inferior grades of homicide, to find out whether the case in hand be a case of murder or not; for it specifies precisely what the crime is, and expects the case to be made out by evidence. Again, if we suppose his whole chapter of homicide to be

stricken out, and the provisions of the common law introduced in their place; in that case those provisions will be still more at variance with his code of procedure; for then, not one of his precedents or forms of indictment will agree with those common law provisions. None but the common law forms of indictment will agree with them; and if these be introduced, his rules for prosecuting them will never agree with them. None other than the common law rules now in force, will, in truth, ever be found to agree with them. Suppose, then, that even these old and well tried rules of the Code of Procedure are applied to the prosecution of all other offences; this will introduce a strange anomaly and confusion into the law, without the slightest reason or necessity; for the same set of rules which are now in force, are equally applicable to the prosecution of crimes of every description, varied, as they are, and exactly suited to the nature of each.

Thus it is seen that the adopting of our present definition of murder into the code, will remedy none of its defects, but rather make them, if possible, worse. It will be introducing it into bad company, with which it never can agree.

On the important question when, and under what circumstances it is lawful to destroy life, "in the execution of the lawful orders of magistrates," our author tells us, "The rules are not to be found in the positive enactments of our law." *In the positive enactments*—another instance in which he puts *a part* for *the whole*. In our statutes, they are not; but they are found in the common law, and with much more justice and precision than they are in his code. See my strictures, p. 39.

In what cases it is lawful to kill "in defence of our persons" or "our property," he says, "presents another question, on which we find the same deficiency." In our statutes does he mean? or in the common law? If in the latter, there is no such deficiency.

Here Mr. Livingston closes his catalogue of "defects in the present system," and then gives a summary of what he thinks he has proved. In this he says,

1. "That as respects certain crimes, the law to which they are referred for their definition, prosecution, and the evidence required on the trial, is not only uncertain, but placed beyond the reach of the people." The reverse of all this, I think, is shown, in the preceding remarks, to be the fact. As to the law of evidence, he has not even attempted to show any uncertainty in it, save only in one single instance; and there, the uncertainty that did exist, is done away by the very authority he cites. Nor has he attempted to find fault with so much as a single rule of this important title of the present law.

2. "That even that rule, uncertain and difficult of access as it is, does not provide for offences against any of the statutes passed since that of May, 1805." The reverse of this is also shown to be true.

3. "That if a long list of oppressive and absurd penal laws, forming a part of those by which the country was governed prior to the cession, are not now in force, according to the strictest construction of law, at least reasonable doubts may be entertained on that subject; and that, in bad times, they may be made the instruments of oppression." The preceding remarks show, that there cannot possibly be the least doubt on

this subject. Those Spanish criminal laws are most clearly abrogated, and the common law introduced in their place.

4. "That our penal statutes remedy none of these defects." The foregoing remarks show the reverse of this to be true.

5. "They repeal none of the ancient laws." This is wholly incorrect. The acts of congress, together with our own statutes, have repealed all the ancient criminal laws; and lately, all the ancient civil laws also.

6. "They give new penalties for offences punishable by former statutes, leaving it doubtful whether they are intended as substitutes for the old punishments, or additions to them." This may be so; but if so, it is a fault in our statutes, and not in the common law part of our system. It is in the *penal part* of the law, and not at all in that all important part of it, which governs on the question of guilt or innocence; and therefore, it cannot be too often repeated, affords not even the shadow of a reason for overturning the whole body of our laws.

7. "They punish slight offences with undue severity, and impose inconsiderable penalties on more dangerous crimes." This also may be so: but what is said in answer to the preceding article, is a full answer to this.

8. "They give, in some instances, to the judiciary, a discretion touching on legislative power, and wholly deny it in others, where justice and humanity require it." If this be so, it is still a fault in our statutes, and not at all in the common law part of our system. It can only refer to the discretionary power of assessing fines and imprisonment, and relates solely to the *penal part* of the law. See above, No. 6.

9. "They leave unpunished many acts and omissions, injurious to society, while others are made offences, which might be repressed by public opinion." This again may be so; but it is still a fault in our statutes, and not at all in the common law part of our system; and is already answered above, in No. 6.

10. "They are multiplied without necessity on the same(or different modifications of the same) offence, giving occasion to doubts whether the new statutes are intended as a substitute for, or addition to the old." This again may be so: but still it is foreign to the question in hand. It relates only to penalties, and is a fault in our statutes, if the fault exist, and not at all in the common law.

11. "They are deficient in precision of language, and in the order required by propper arrangement." And what then? This is still a fault in our statutes, and not in the common law. Let these statutes be amended if they require it; but there is no necessity, in order to do that, to adopt his code, and thereby overturn our whole system.

Having closed his summary, and apparently taking it for granted that he has proved all his positions, our author makes a most eloquent and impassioned appeal to the feelings of the gentlemen composing the legialature, beseeching them to interpose speedily their authority, to correct the defects which he fancies he has shown to exist in our law, and thereby avert the mighty evils with which he would persuade them the state is threatened—in other words, to persuade them to adopt his code. I have neither skill nor inclination to follow his example in this. My appeal is to the sober good sense of the people, which I think is the only kind of appeal that ought ever to be made on a question like

that now in hand. And to convince the sound judgment of the people on this question, nothing more can be required than again to refer them to their own experience, and to the experience of the whole American people, in which proof positive is found, that no such defects exist in our law as Mr. Livingston pretends to have found in it. I would entreat them to reflect well on the extreme danger of overturning and destroying, at a single blow, the whole body of their criminal law, and trusting to an entire new system, of which they cannot have any knowledge or experience. I would then entreat them to take up the new code and examine it for themselves; and see whether the dangerous defects and vices which I have pointed out, do not really exist in it. And lastly, I would remind them, that, in order to make way for this new code, they are actually called on to permit their old and well tried system of laws to be torn away and totally destroyed, and then to put their lives, their liberty, and their reputation at stake, upon the experiment of Mr. Livingston's code. These things I would entreat them to consider maturely—and then decide the important question.

We come now to the second division of the report before us, which its author entitles "Objections to Reform considered." He has not, however, condescended to mention the names of any of the objections to his code; for what reason I shall not stay to inquire. I find, however, some of my own objections noticed, and to these, my remarks shall be chiefly confined.

In this division of his report, he proceeds in the same strain, arguing from a part to the whole: a part of our system he finds, or thinks he finds, defective; and from this he argues that the whole is so.

For example. "A penal code," he thinks, "is susceptible of a nearer approach to perfection" than a Civil Code; and to prove it he argues thus: "Nothing being an offence but doing that which is forbidden, or omitting to do that which is enjoined by law. It follows, that as the law can only enjoin or forbid, by the use of language, there can, of necessity, be nothing penal, but that which is not only foreseen, but expressed by the legislature; in other words, that which is contrary to written law; and whenever an act is not thus forbidden, or enjoined, there can be no punishment for doing or omitting it. If, therefore, the greater difficulties of framing a Civil Code, have been surmounted so as to render it an acknowledged blessing to the country, why should objections be raised to the easier operation of framing a written system of penal laws," p.53. Here a *part* is put for the *whole*; and because he thinks it easier to frame a law, designating what particular act shall be considered as offences, than to frame a whole Civil Code; therefore he argues, that it is an "easier operation" to make a *whole* system of penal law. Now, however easy it may be to frame a law designating what acts shall be designed offences, this is but a small part of a system of penal law; and it does not follow, that to frame the whole system is at all easier than to frame a civil code; still less does it follow, that "a penal code is susceptible of a nearer approach to perfection," than a civil code.

He calls our Civil Code "a blessing to the country." This remains yet to be determined by experience, the only sure test of all human laws. But admitting that code to be, in the main, wise and good, does it follow that Mr. Livingston's must be so too? Much of our Civil Code is founded on past experience; and

so far the presumption is in its favor. But Mr. Livingston's code has no such plea in its favor. It is *new* throughout, grounded on a *new theory*—the mere creature of his own mind; and disdains to receive instruction from experience. Another important difference is this. At the time of forming our first Civil Code, all the laws of the country were Spanish, locked up in the Spanish language, then not understood, probably by one in a hundred of the people, whether French or Americans. There was therefore a necessity to provide that code. But with regard to our criminal laws, our situation is precisely the reverse: and, I repeat, we do not want this new code.

In another place, he tells us of "fourteen cases," being "arrayed on the one side" of a cause, which "were met by an equal force on the other:" *ergo*, he argues, there is no certainty in our present law. Let me ask—were all those cases equally applicable to the question then on trial? Were they really contradictory to each other? or, which is a common case, was it only an effect of the counsel to make those cases mean something to suit their own purposes, whether the cases really meant it or not? Mr. Livingston has not told us how this was.

But admit that, on the point then in question, the law was not yet settled, the argument is just like that above noticed. In one or two points intrinsically difficult in themselves, the law is not yet settled: therefore, he argues, the whole law is unsettled and uncertain! His report is full of arguments of this kind.

It is a common and true observation, that to multiply the number of statute laws, never fails to increase the perplexity and difficulty of finding out and settling the true meaning of the law; and this is urged by Mr.

Livingston as a defect in our system, and consequently as an argument for adopting his code. Another instance this, of the same kind of argument. These perplexities, which *arise out of our own statutes*, are a great inconvenience; therefore, the whole common law part of our system, out of which *they do not arise*, is defective! Such is his argument, p. 50.

Would his code remove these perplexities? Is it so perfect that it never would require any amendment? Would not every amendment to it increase the perplexity? Would not the code itself increase them, by giving rise to a thousand new litigated questions? Most assuredly it would. See my strictures, p. 58, *et sec.*

Our constitution forbids the legislature to adopt any system of laws, merely by refering to them, and declaring them to be in force: and Mr. Livingston urges this as an argument for adopting his code, in order to remove the defect which he supposes to exist, by reason of there being many crimes to which the common law cannot be applied—a defect which he insists can no longer be remedied by referring to, and adopting that part of the common law which is wanting, p. 49. We have seen that there is no such defect in our system, the common law being clearly in force, applicable to all crimes whatever.

But what I would here observe is, that to adopt his code, would produce the very mischief he supposes to exist. It would abrogate the whole common law, which would then be gone forever; for it never could be again adopted, if the position he takes be correct, which I am not now disposed to controvert. And then, however defective or vicious the provisions of his code might, in experience, turn out to be, we never

could retrace our steps, by repealing it, and restoring our present system. The only remedy left, would be for the legislature to enact special provisions, to remedy whatever defects or vices may be found in it. Never yet was there a code of laws made, that did not soon appear to require amendment, and it is folly to suppose that such a one ever will be made. And when this business begins, where will it end? Who can calculate the perplexities, the difficulties, the litigation—in a word, the amount of mischief that in this way must arise out of this new code?

"We must have detailed laws," says our author, p. 50: *ergo*, you must adopt the code. Answer: We have detailed laws already, and far better ones than your code would be: therefore, we do not want your code.

"To know them," (the laws) "is the right of the people." True, and the people already know them, as we have before seen.

"The almost entire abandonment to the judiciary of that part of the legislative duty, which consists in designating the punishment that shall be inflicted for each offence," p. 44. Our laws give power to the courts to assess fines and imprisonments, according to the circumstances of each case, within certain prescribed limits; and this Mr. Livingston calls, "the almost entire abandonment to the judiciary of that part of the legislative duty, which consists of designating the punishment, &c." To exercise a power expressly given to them by law, it seems Mr. Livingston considers as performing a "legislative duty." See my strictures, p. 22, on this.

But what has this to do with the common law part of our system? Just nothing.

"The legislature of one of the largest and most enlightened states is now occupied in the revisal of all their laws, including the criminal code, and throwing them into methodical form." Be it so. It is one thing to *revise* a system of laws, and another to tear them up by the roots, and destroy a whole system at a single blow, as the new code in question is to do, if adopted. Let us see their revisal before we take it as a precedent for us to follow.

"We should hasten, before it is too late, to prevent the ills which we cannot compensate after they have been suffered." Could a greater ill befall us than to adopt his code? Not easily.

"The general operation of our laws," he says, p.56, "on the character and morals of the people of the whole community," is "bad." Why? "Nothing," he says, "in a free government, can be a worse symptom, than an indifference to bad laws, because we do not suffer by their immediate operation. In the people it evinces a selfish feeling, a carelessness of the welfare of others, and an insensibility to the public good, destructive of every patriotic sentiment. This dangerous apathy is created and fostered by suffering the existence of impolitic and oppressive laws, although circumstances may not have called for their application." Strange, that the people of Louisiana should be so "selfish" as to be unwilling to give up these bad laws; and still more strange, that the whole American people should be as selfish as they are; especially as those same bad laws have so long served to protect them in the enjoyment of their rights and liberties. To be serious: where are those bad laws? Let their existence be first proved, and then this eloquent declaration may be something to the purpose: but not till then.

"There is then evil," he exclaims, in the next page, "positive evil—the evil of political degradation, or constant apprehension, although the law should never be executed." If so, how politically degraded must the whole American people be, who all live under these same "bad laws!" Strange, that a man of his abilities should permit himself to write in this strain.

But the laws, he thinks, *are* executed, and that "they have a general, active, and most pernicious operation; one that never for a moment ceases, and for the continuance of which, every legislature that meets, incurs a most awful responsibility." What is this? Why, "The only punishments, (with the exception of death) now inflicted, are fine and imprisonment. To some crimes, the law adds hard labour; but as no means are provided for inflicting this punishment, the only confinement that is suffered, is one of idleness, debauchery, and vicious association. Of all punishments, this is the most unequal, and most injurious to society and to the individual. As this subject will be fully discussed in the preliminary report on the Code of Prison Discipline, it is not now intended to enter into the reasons which conclusively show, that the laws which permit or direct the indiscriminate association of the innocent with the guilty before trial, and of those affected with different degrees of guilt after condemnation, are the great causes of the depravity which they profess to punish. Such laws are ours. Such are, and always will be, their effects: and you, legislators! you have collectively the power to remove this evil, to repeal these laws, to replace them by those which are better; (you can scarcely substitute worse.) Each of you, individually,

may cast off the responsibility of their continuance, by a correct, sincere resolve to adopt what is good, and amend what is erroneous in the system that is proposed ; and by rejecting with disdain the false and fallacious and dangerous lullaby that is sung to your consciences, that *all is well.* All is not well! The general operation of your laws destroys the morals of the people, saps the foundation of your liberty, and is calculated to spread general alarm. By their particular operation, they endanger the safety of the innocent, and favor the escape of the guilty."

This passage contains an important truth, and also a great fallacy. The truth contained in it is, that *a part* of our system of laws is really bad, to wit, that part which *prescribes the punishment* for crimes, and *directs the mode of inflicting it.* Of this part of our laws, I really think with Mr. Livingston, that it is scarcely possible to "substitute worse," that is, as to the mode of inflicting the punishment. And it does seem to me, that there is an absolute necessity for completing the penitentiary plan, or of abandoning it altogether, and resorting to some other mode of punishing crimes. But to discuss this branch of the subject comes not within my plan.

But to produce this defect, in this one part of our system, as an argument to prove the *whole system* so bad that you can "scarcely substitute worse," as Mr. Livingston has done in this passage, is one of the greatest fallacies that can be imagined. Our rules of law which guide us in the definition of crimes, in instituting the prosecution and carrying it on, the forms of indictment, the means of defence, the method of trial, the rules of evidence—in a word, all those rules which we derive from the common law, and

which govern throughout, in deciding the all important question of guilt or innocence, which Mr. Livingston himself admits, "pervade" the whole of our law, and amount to at least three-fourths of the whole; these constitute that great body of rules which have so long served as a shield, and so effectually secured the whole American people in the enjoyment of their liberties. Yet because a defect is found in another distinct branch of the law, all these are to be confounded with it, and all to be condemned as bad! How bad must that cause be, which drives its advocates to resort to such arguments as this!

Let it again be observed also, that it is not the common law that prescribes the punishment, and directs the mode of inflicting it. This is done by our statutes, and in them alone this evil is found. How utterly fallacious and unjust is it then, to impute to the common law a vice which exists only in our statutes.

"The hacknied objection against improvements, that they are new," says he, p. 54, "amounts to no more than that they are improvements." Here he takes for granted the very thing in dispute. We deny that his code is an improvement.

"No comparison," he says, p. 55, "can with justice be made between the situation of the other states, in this respect, and ours;" that is, with respect to justice being well administered, and the peace of the state being preserved. The reasons he assigns for this are, that, "With them the common law is indigenous,; they have grown up under it, and modified it to their wants and conveniences. They have not the embarrassment arising from the laws of foreign countries unrepealed among them.

Their people all speak the same language, and are familiar with the technicalities of the law." Now, we have seen that the people of this state have all the means of acquiring a knowledge of the law, that the people of the other states can have. It has been now twenty-four years in operation in this state, and here also the people have become familiar with it. Nearly a whole generation have grown up under it. At least one third of the people too, are Americans. We have seen also, that we have no such thing as the "laws of foreign countries unrepealed among us." The comparison therefore is just. The common law in force among us, is the same throughout with us as with them, in criminal cases, as to all that part of it for which I contend; or, if they have made any changes in it, I presume they are slight and trivial compared to the whole. But if they have made any, it lies on Mr. Livingston to show them. We assert that their system of criminal law, and ours, as to all that comes into operation prior to the final judgment, is the same. And if the system be good with them, which Mr. Livingston does not pretend to deny, it is undoubtedly good with us also.

The common law, he says, p. 58, "is eminently calculated for the escape of the guilty, by the numerous objections which it admits to the forms of proceedings." This brings into view his Code of Procedure—a code which is intended to overturn our whole system of proceedings in the prosecution of offences, and innovates every thing, from the beginning to the end of the prosecution. So that all those rules which were just now mentioned, which have been formed, and introduced into our law, by a long succession of the most learned, the most able, and

upright men who have adorned the highest tribunals, of both England and the United States—rules which, (it cannot be too often repeated,) have been matured and brought to perfecton by experience, and approved in practice by the universal suffrage of the freest people on earth—all this system of rules is to be swept away, to make room for a code which Mr. Livingston, wiser than all who have gone before him, has prepared, and thinks is far better!

And what are the faults he has been able to find in that system of rules, after laboring three years for that purpose, and employing in that work all the powers of his highly cultivated mind? Not one of any importance has he been able to specify.

He speaks of "numerous objections," which our law admits, and tells us in vague, declamatory language, that they are "eminently calculated for the escape of the guilty." But has he pointed out a single one of those exceptions, and shown us *how* it operates to produce that effect? and how it can be dispensed with, without producing a far greater evil? No such thing.

These exceptions may, indeed, sometimes enable the guilty to escape, when the prosecution is carelessly or unskilfully managed; but scarcely ever will this happen, where the prosecution is managed with tolerable skill and ability. Mr. Livingston forgets that these exceptions were not provided for the guilty, but as a shield and defence for the innocent. He forgets that there is always danger of involving the innocent in the condemnation of the guilty; and that the very end and design of these exceptions, is, to protect the innocent from so distressing a result: and long experience has shown, that they are admirably calculated for that purpose. If they are sometimes abused, to the purpose of enabling

the guilty to escape, it is nothing more than that to which all human institutions are liable. This is incomparably the lesser evil of the two; and accordingly, it is one of the humane maxims of our law, that it is better that ten guilty persons escape, than that one innocent one should be condemned. The rules by which these exceptions are allowed, are the arms by which an innocent man is to defend himself against an unjust prosecution. Destroy these, and you thereby disarm him, and leave him without means of defence against any prosecution, however iniquitous or oppressive it may be.

Mr. Livingston complains of the strictness required by our present law in its indictments, and the consequent ease with which they may be quashed, or set aside. But in this he loses sight of the principle on which this strictness is founded. It is this: Our law requires the offence, together with the attendant circumstances of time and place, to be stated in the indictment with such certainty, that when the truth of the indictment is established by the verdict of a jury, there can be no doubt of the guilt of the accused, nor of the crime's having been committed within the jurisdiction of the court. The indictment thus found to be true, is the ground on which the court is to pronounce its judgment, and if it wants certainty in either of these points, this leaves it uncertain whether the accused be guilty or not; or uncertain whether the court have jurisdiction or not; in either of which cases the accused ought not to be condemned: for no man can be justly condemned, unless the court have legal jurisdiction; nor unless it appear with absolute certainty that the accused is guilty of the crime charged against him.

In giving judgment, the court is confined to what is stated in the indictment, and cannot look beyond or out of it, for any thing whereon to ground their judgment; and this is founded in the highest reason. For, if they were permitted to depart from this rule, and to look about for something out of the record, on which to ground their judgment, there would remain no assignable limit to the range they might take; and consequently no certainty as to what their judgment might be; or, in other words, there would be no rule to govern them in giving their judgment.

Such are the principles of our law on this important point. But these principles, important as they obviously are, find no place in Mr. Livingston's code. To show this, let us look into one or two of his forms of indictments. That which he gives for the crime of infanticide, as he calls it, or the murder of an infant, is as follows:

"That J. S. on the (insert the day and place) in order to conceal the birth of a male infant, born on the day of in the year of (here insert the name of the mother) or (if the person accused is the mother, say of the said J. S.) did, with a premeditated design to kill, expose the said child to the inclemency of the weather in an unfrequented field in the said parish, on the night of the said day of and left the said child so exposed during the whole of the said night, of which exposure, the said child, on the same night, died: wherefore the said jurors present, that the said J. S. the said male child did, in manner aforesaid, with a premeditated design, kill and murder." p. 233. Now suppose all this to be found true by the verdict of a jury, does it show with certainty that the accused is guilty of murder? It

does not. For aught that appears in it, the unfortunate mother might have been a complete maniac when she committed the act; and if so, who would pronounce her condemnation. Tell me not that in that case the jury could not have found a verdict against her; for that would be for the court to proceed upon a fact that does not appear in the indictment, and which they cannot know without travelling out of the record, the danger of which we have already seen.

Again, his indictment for passing, or offering to pass counterfeit money, is as follows:

"That J. S. on, &c. (as in the former) having in his possession one counterfeit gold coin of the United States, or one (describing the counterfeit coin as above) and knowing the same to be counterfeited, did, on the day and year last aforesaid, at the parish of L. pass, or offer to pass the same, (as the caes may be) to one J. R. or to some person to the jurors unknown." p. 194.

Suppose this again to be found true by the verdict of a jury; does it show with certainty that the accused has committed any offence? Not at all. It states that the accused "did pass" the counterfeit coin, but it does not say that he passed it *as true coin*, or that he passed it with the design to defraud any person; and therefore no crime has been committed. He might "pass" it by giving it away, *as a* counterfeit piece of no value. Tell me not that the concluding words of this indictment will remedy this defect. His conclusion states the passing to be "contrary to the laws of the state, and against the peace and dignity of the same." But if the counterfeit piece be the property of another, and he pass it off without the owner's consent, by giving it away,

this would be "contrary to the laws of the state"—a civil injury, but not a crime. But it is also "against the peace and dignity of the state." What do these words refer to? To the act of passing the coin, which is not shown to be a criminal act. Now, to allege an act to be against the peace, &c. without showing the act itself to be a crime, is nonsense. These words express a *conclusion of law*, not of *fact*. But the indictment states no facts from which that conclusion can be drawn; and therefore it is a conclusion without premises to support it. Nor can the verdict cure the defect. The jury may have had facts enough proved in evidence to support this conclusion; but that the court cannot know without travelling out of the record, which, we have already seen, would be highly michievous; and the indictment does not support the conclusion. Such indictments, therefore, are not worth a straw; for we see that after the accused is convicted on them, it is still impossible to determine whether he is guilty of any offence or not; and yet Mr. Livingston complains loudly of the uncertainty of our present law!

Are all his forms of indictments like these? I cannot tell, for I have not examined them all critically. But they are all original, not like any others I have ever seen; and consequently, I should consider the presumption as being strongly against them.

Mr. Livingston, we have seen, complains of the exceptions to indictments, and at the same time loudly censures our present law for its want of certainty. Does he not know that the natural effect of those exceptions is to produce certainty in indictments, the very place where certainty is necessary, more than it is any where else? for, on this, as we have just seen, the whole weight of the prosecution depends.

The provisions concerning grand jurries are no better. "The first act of the jury, after having retired, shall be to organize themselves by electing two of their members, the one to preside at their sittings, to be called the foreman of the grand jury, the other to be their clerk;" and then it directs the mode of electing them.

"Two constables, or deputies of the sheriff, shall be appointed to be constantly in attendance on them, the one as door-keeper, the other as messenger, to carry the orders and citations which they may issue."

"The deliberations of the grand jury shall be secret: no one shall be admitted while they are sitting but the public prosecutor, and such persons as may be sent for to appear as witnesses, or may come to make complaint or give information relative to the infraction of any penal law;" but the public prosecutor "must not be present at their deliberations or descisions."

Every grand juror knowing of any crime committed, is to declare it to his fellow grand jurors, and they are bound to hear all complaints—which is right. But,

"The grand jury may issue a summons ordering the attendance of any witness, and if he fail to attend, may issue an order directing the sheriff to arrest and bring him before them, and if he shall refuse to be sworn or testify, they may, by a like order, commit him to prison, and he shall not be released until the grand jury are finally discharged, unless he consent to be sworn and give testimony as ordered, and shall moreover be liable to such punishment as, in such case, is provided by the penal code.

"Every order of arrest, or other order of the grand jury, shall issue in the name of the grand jury, (specifying the parish or district for which they are sworn) and shall be signed by the foreman and attested by the clerk."

Several provisions then direct the manner in which the grand jury are to conduct their proceedings, and then it provides that they may, "with the assent of twelve members, make any alterations or amendments, either in the description or circumstances of the offence, according to their view of the testimony and law, or in the name and description of the offender;"* and when found, the indictment shall then be signed by the foreman and clerk, respectively, by each adding to his name the quality in which he signs."

When they decide against finding an indictment, "a certificate shall be sent to the court, stating that the grand jury find no cause of accusation against such person, [naming him] for the offence of which he is charged, [specifying it,] which certificate shall be signed by the foreman, and attested by the clerk: whereupon, such person, if in custody, shall be discharged, or if bailed, the bail bond shall be cancelled. But such finding and discharge shall not prevent another accusation for the same offence, if other testimony be produced;" nor shall it discharge him of any other offence; and the discharge shall not be ordered till the public prosecutor be notified.

"No record shall be kept of the manner in which any member of the grand jury has voted on

*This will destroy every indictment they may alter.

any question before them; nor can any member be obliged or allowed to declare, even in a court of justice, in what manner he, or any other member of the grand jury, has voted on any such question, or what opinions they expressed. But they may be called on, in any court of justice, [in cases where evidence of that nature is otherwise legal] to show that the testimony of a witness examined by the grand jury was different, or consistent with that given before the court."

"It is his" [every grand juror's] "duty to keep secret whatever he himself, or any other juror may have said, or in what manner he or they may have voted on any particular question before them," under the penalty of not less than thirty, nor more than one hundred dollars. And their oath binds them to "perform all the duties enjoined upon them as grand jurors;" so that they are also sworn to all this secresy. Further,

"No grand juror shall be prosecuted or sued for any thing he may say, or any vote he may give in the grand jury, relative to any matter legally before them," with the exception of "perjury, in making any accusation, or giving evidence to his fellow jurors.

"Every indictment found by the grand jury shall be delivered by the clerk into the hands of the presiding judge in open court; and if the person indicted be in custody, or bailed, for the offence of which he is indicted, the judge shall deliver the indictment to the clerk to be filed. But if the person indicted be not in custody, or not bailed for the offence of which he was indicted, then the judge

shall retain such indictment until the party be arrested, or until the last day of the term if he be not arrested, and shall then deliver it to the clerk to be filed."*

The grand jury must sit every day during the term, if there be business for them, and at the end of the term, their functions cease. "But they may determine their own hours of meeting and adjournment." "The indictment shall be in the following form :"

"To the district court of the district (or the criminal court, giving the style of the court as the case may be.)

"The grand jurors for the (name the parish and district) on their oath present, that A. B., on the day of &c." and it concludes, "contrary to the laws of the state, and against the peace and dignity of the same.

"C. D., Foreman.

"E F., Clerk."

The first thing that strikes the eye in all this, is its aping the forms of a legislative assembly, in a grand jury, which smells pretty strong of the ridiculous. The grand jury *elect* their own *speaker*, called the foreman; and their own *clerk;* they have their *door-keeper*, and their *sergeant at arms*, called a constable or deputy sheriff; they sit and act not only separately, but independently of the court; and, instead of coming into court with their foreman at their head, to deliver in their presentments, they *send a message* to the court by their clerk, informing the court what they have done! But if there were nothing more than the ridiculous in it, it might pass.

* What good reason can be assigned for this ?

In order to form a just estimate of these new provisions, we must contrast them with the provisions of our present law. And first, let us keep steadily in view that important fundamental rule of the law of evidence, which invariably requires *the best evidence the nature of the case admits of to be given;* and that other corresponding rule, which forbids the courts to act *judicially* upon any evidence inferior to that best evidence. This rule of evidence is obviously founded in the very nature of things, since, to offer inferior evidence, when the superior is in the power of the party to produce, naturally excites a suspicion that the superior evidence is kept back, because it contains something that would contradict the inferior evidence which is offered. Nothing less than the best evidence, can produce that certainty, which justice requires.

By our present law then, the grand jurors being first drawn by lot, from the whole number of jurors returned, they are called, and answer to their names in open court: the list is then handed to the court, who appoint one of the jurors to be their foreman: the jurors are then sworn in open court; and having received their charge from the court, they retire, and proceed to business. All these proceedings are then entered on the records of the court. When the grand jury find an indictment, they all come into court, where they are again called, and all answer to their names. The clerk then asks them if they have any bills to present? on which their foreman hands in the presentments, or indictments they have found, to the clerk. The clerk then hands them up to the court, who examine the foreman's certificate endorsed thereon, certifying each indictment to be *a true bill,*

or *not a true bill,* and returns them to the clerk, ordering them to be entered of record.

Now, in all this, the best evidence the nature of the case admits of is given, to prove the *genuineness* and *authenticity* of the indictment. The court know the jurors who bring it in, to be the same who were sworn of the grand jury; for their names are on the record, and they have all just answered to their names in open court: the court also know who their foreman is, by the very same evidence; they know his signature to the certificate endorsed on the indictment to be genuine, for he has just acknowledged it to be so in open court, by handing in the indictment; and they know it to be the act of the grand jury, by its being returned as such, in their presence, in open court. And further, if the genuineness or authenticity of the indictment should afterwards be questioned, there is the evidence of the record to prove both. Here then is the highest evidence the nature of the case admits of, amounting to absolute certainty, of the *genuineness* and authenticity of the indictment.

And how highly important this evidence and certainty is, will at once appear, when we reflect, that on the indictment of a grand jury, the accused is to be put to answer and defend himself against a criminal charge, in which his reputation, his liberty, or even his life itself may be put in jeopardy; and that for this purpose, he is to be arrested and held to bail, and in some cases confined within the four walls of a prison.

Now, all this certainty, so highly important, is completely destroyed by the provisions of the new Code of Procedure; for the grand jury *elect* their own *foreman,* and their own *clerk,* in their *secret sit-*

tings, and there is nothing in the law which requires them to make any record of these appointments. They are indeed to send "a message by one of the grand jury to the court, stating which members have been respectively chosen" to those offices. But is this the best evidence the nature of the case admits of, to prove who the foreman and the clerk are? A mere message, sent by one of the jurors! Is this evidence equal to that which the court have in their own records, under the present system? Most assuredly not; and if so, it is utterly inadmissible under the rule of evidence before noticed. Under that rule, it is no evidence at all.

But again, the grand jury are not to come into court and deliver their presentments, or indictments, in open court, and in presence of the whole jury; but it is to be *sent*, in the way of sending a message, and "delivered by the clerk into the hands of the presiding judge in open court." Now, I ask, even supposing that there was any evidence on which the court could *judicially* know *who* the foreman of the grand jury is, which we have just seen there is not, how are they to know *judicially*, that the signature of the foreman, signed to the indictment, is genuine? Of this they have not a scintilla of legal evidence, much less the best evidence the nature of the case admits of, as we have under our present laws. Is this the kind of certainty Mr. Livingston would infuse into our laws? Will he any longer venture to call his new codes "improvements," while such provisions as these are found in them?

But this is not all. We see that, by these provisions, "the grand jury may issue their summons ordering the attendance of *any* witnesses," and even compel their attendance by arresting and imprisoning them.

They may then call in witnesses *in favor* of the accused as well as in favor of the prosecution, and proceed to hear and determine the whole cause. If they may send for *any* witnesses, then they are to decide who is a competent witness, and who not; as well as every other question of the legality of evidence that may arise; and thus they are vested with all the powers of the court, as well as those of a grand jury. Nay, more; by this and another provision taken together, they have all the powers of the petit or traverse jury also; for, in many cases, their decision will amount to a final acquittal of the *offence* itself. For, on their refusing to find an indictment, and sending their certificate to that effect to the court, the accused "shall be discharged;" and never can be again indicted "for the same cause," unless "other testimony be produced." And as all their proceedings are secret, it will be impossible ever to determine whether "other evidence" is produced or not.

Now, the consequence will be, that, while all these powers are vested in the grand jury, the court will seldom be troubled with the trial of criminal prosecutions. They will be tried and determined by the grand jury. *There* the defence will be made, in every case; and generally with success. Who then does not see, that the whole dignity and efficacy of our criminal jurisprudence will be prostrated by these provisions, and rendered subservient to the designs of every artful villain who may choose to commit a crime? Under these provisions, aided by the advice of ingenious counsel, always to be had, and not always very scrupulous concerning the means to be employed, in nine cases out of ten, perhaps in ninety-nine out of a hundred, such an offender would, by bringing his witnesses before the grand jury, be discharged, and thus set the law completely at defiance.

If I do not pursue my examination of this code further, it is not for any want of materials in it for criticism, but for want of room; and I confess my inclination leads me to hasten to the conclusion of these remarks. Enough I think has been shown to evince the dangerous tendency of these new codes. I leave them, therefore, with a few more general observations.

All its forms of indictment for homicide are framed to suit the provisions of the code in the chapter on that offence, and we have seen how exceedingly vicious those provisions are, and consequently all these forms of indictment must be equally bad. The provisions, too, prescribing rules for framing indictments, those directing the mode of arraignment, and also those on the subject of arresting judgment, appear to me defective, and will, I have no doubt, if ever they become the law, be found full of uncertainties that must produce numerous difficulties, and questions of the most perplexing and distressing kind. In a word, the whole code is one continued innovation; and in such a work, what else could be expected? If Mr. L. has failed in it, he has only failed in that to which no human mind is equal; and which consequently, no man ought ever to have undertaken to perform. To return.

"If instances are not produced to you," says he, p. 58, "of individuals suffering innocently, you are not from thence to conclude that such cases do not exist;" and then he goes on to ascribe whatever cases of that kind may exist, to the ambiguities in the definitions of crimes given by our present law. These ambiguities, he alleges, make the chances equal, whether the meaning of the legislature be understood rightly or not, and consequently it is, as he says, probable, that the penalty of the law may have fallen "on the head of the inno-

cent as well as the guilty." Now, the probability is all the other way; for it is a rule of our law, that in case of any real doubt, the prisoner is to be acquitted. Whatever ambiguities of this kind may be found in our law, exist also not only in the common law part of our system, but in our statutes; so that here again the argument is from *a part*, to *the whole*; the fallacy of which has been so repeatedly pointed out. Besides, a few minutes ago, the complaint was, that our laws facilitate the escape of the guilty; but here, it seems, they condemn the innocent!

In my former work it is shown, that numerous litigated questions must inevitably arise, in settling the meaning of these new codes; and the dreadful evils this must necessarily produce, are there pointed out. This, Mr. Livingston does not venture to deny, but endeavors to avoid the force of my objection by the plea of necessity. "But we are told," says he, p. 58, "that the introduction of the new system will be attended with trouble and expense: trouble to learn its provisions, and expense to carry it into effect. Of this there cannot be the least doubt. All laws that ever were, or ever will be made, are liable to this objection. But whatever trouble they give to learn them, or whatever sums they cost in making, we must have laws; and if we are wise, we must have good laws." Now, it so happens, that we already have laws, and good laws too: and this being the fact, his code is gone by his own decision, for he immediately adds, "If those which we now have are good, he would be mad, or worse, who should propose to change them."

"All that has been thought good" in the "excellent materials of the present system," p. 59, "have been used in the construction of the system that is now

offered to replace it." If so, those materials have been spoiled in the using. They have been cut in pieces, mutilated, and mixed with so many new and fanciful materials of his own, that their whole value is thereby destroyed. Of this his chapter of homicides, and that concerning grand juries, present strong examples.

The change our author has made in the meaning of nearly all the terms used in our law, or rather the new meaning which he attempts to fix upon them, was pointed out in my former work, where it is shown, that the necessary effect of this change, is to involve the meaning of his whole code in obscurity, and render it perpetually liable to be misunderstood. In answer to my argument, he says: "There is some truth, but more plausibility, in this argument. It does not, like others, found itself on popular prejudice exclusively, but has great weight with many prudent men, who do not detect the fallacy of the argument, or perceive how little the facts on which it is founded apply to our circumstances." Let the fact be kept in mind. It is, that his code attempts to change the settled meaning of nearly all our law terms. Now, the meaning of the words of language is not settled and ascertained by *legislative act*, but by *usage* and *common consent*, anterior to all legislative acts. Legislative acts must be expressed in words, and those words must have a meaning, already settled, and known before the law is made, else the legislative act itself can have no meaning. Or, if the legislature, in passing a law, use the words of language in a sense different from that in which they have hitherto been used and understood, such an act must be unintelligible, just so far as the legislature has employed words, in a sense different from that in which they have hitherto been used and understood. Now,

this is precisely what is done in these new codes; and consequently this deviation from their usual and settled meaning, must necessarily render the meaning of the codes obscure and doubtful. The fact, that he has so employed his terms in a new sense, he does not deny. Let us now attend to his argument.

He says there is a "difference between the penal and civil law, to which last," he insists, "all" our "facts and all" our "reasoning apply." Civil law, he contends, takes in a far wider range, and is eventually undergoing changes, from the continually changing state of society. But "criminal laws, on the contrary, are infinitely more contracted in their operation. Emanating from the sovereign will, they admit of no alteration, but that which he declares:" and this part of the law, he contends, does not change with any change in the state of society. "The law lives in itself, and can neither be changed or modified, so as to be accommodated to any of these, but by positive legislation. What the law forbids, is an offence: but the law cannot forbid, without being perfectly intelligible."

Granting all this, his conclusion does not follow. That "the law cannot forbid" nor command, "without being perfectly intelligible," is true; but that implies the necessity of using *terms that are intelligible*, in framing the law; and we have just seen, that the meaning of these terms must be settled, and known, anterior to the making of the law; without which it is impossible to make a law that is intelligible at all. Without this, it is equally impossible to make any new law, whether civil or penal, that is intelligible. This attempt, therefore, to distinguish between civil, and penal law, is nothing to the purpose. As respects the question in hand, there is no difference between them.

But he returns to the charge, and says the "office" of the civil law is "to prevent individual" wrong, "or to grant compensation," and "in doing this, there is an absolute necessity for deciding on cases not previously provided for by any positive law—for this plain reason, that whichsoever way the judge decides, his decision affects private right." The position here taken is true; but the reason assigned for it, is a fallacy. There is indeed such a "necessity for deciding," not because the "decision affects private right," but because it is indispensably necessary that questions of private right should be decided, when brought before a court. But he proceeds, "If the case be a new one, he (the judge) must decide without positive law; he must frame his judgment, by analogical reasoning from the law in similar cases, and if it be correctly drawn, it will be respected for its wisdom, and abridge the labor of further investigation, in subsequent discussions of analogous cases. Thus the jurisprudence of decrees, or the authority of precedent is, by degrees, established in civil cases: first from the necessity of deciding between conflicting claims, and afterwards by the very great advantage of having settled and fixed principles; *stare decisis* being a maxim that usurps the place of regular legislation."

All this is readily admitted: it is in fact what I contend for. In this very way the common law, (which is but another name for what Mr. Livingston here calls "the jurisprudence of decrees, or the authority of precedent") was formed. It is a species of law that is by no means peculiar to England. It is found in every civilized country in the world; it is found in the *civil*, as well as in the *criminal* jurisprudence of this state. Nearly all our commercial law, important as it is, is of that kind; and every decision that is made by our su-

preme court, forms a precedent of that kind, whether it be made in a case that is a new one, or in construing and settling the meaning of our Civil Code. *Stare decisis*, or in other words, when a principle is once settled, by the highest authorized tribunal of the country, and on mature consideration, that it should remain as a settled permanent rule in similar cases, is not only wise and convenient, but matter of real necessity. Without this, there could be nothing settled, nothing certain, nothing permanent in the administration of the law; and consequently nothing certain or permanent in the law itself. It is not true, that this maxim "*usurps* the place of regular legislation." It comes in aid of regular legislation, and gives effect to it; and where regular legislation fails, it only *supplies the deficiency*, precisely in the way Mr. Livingston states. It is according to the order of nature, that it should be so; it is of necessity, arising from the nature of things; for, as has often been said, human legislation never can supply positive laws to meet every case; and there is no other possible means of supplying the deficiency.

Mr. Livingston argues from the doctrine just stated, as if it were confined to the civil law; which is wholly an error. "If the case be a new one," and is a criminal case, is there not the same necessity for it to be decided, that there is in a civil case? Most assuredly there is. And it is undoubtedly as necessary to have "fixed principles" in criminal, as it is in civil jurisprudence and consequently it is as necessary to respect the authority of precedents in the one case as in the other: so that here again our author fails.

He indeed gives up the distinction, except as to "those laws which impose a penalty for their contravention." But here also he fails. Certainty is unques-

tionably as necessary in this part of the law, as in any other; and we have already seen, that certainty in the law depends wholly on certainty in the meaning of the terms by which the law is expressed, no matter what part of the law it may be.

"Especial care," says he, "has been taken in framing the new code to preserve the terms now in use, where the same sense could, consistently with the order of the work, be applied to them; and that whenever new terms were found to be necessary, or old ones have a new or more precise signification, annexed to them, they are fully explained in the book of definitions;" and thus he thinks, "from a consideration of the whole subject, it will be found that the objection is more plausible than well founded." Here, the fact on which our objection rests is admitted:—"Old terms" have "a new signification annexed to them;" and consequently an unknown signification, so far as it is new. "New terms" are also employed, which, consequently, never had any legal signification annexed to them; and this is done, not in one, or a few instances, but in a great many, throughout the whole code. The effect is obvious. It unsettles the meaning of all those terms, and consequently renders the meaning of the whole code obscure and uncertain. The book of definitions is no apology for this mischievous innovation. It is an attempt to alter the meaning of language by a legislative act—an attempt to force upon the people a new signification of terms, which *usage*, the *sole* legitimate arbiter of the meaning of language, has taught them to understand in a very different sense. The meaning of the new terms, and the new meaning of the old ones, must be learned, before it is possible to understand the codes; and in learning this, not only the people, but the gentlemen of

the profession, will be compelled to unlearn all they have already learned, of the meaning of those terms. If this be not throwing the whole law into confusion and uncertainty, I confess I am at a loss to imagine how it is possible for any thing to have that effect.

As to the book of definitions, it really increases the mischief. *Omnis definitio in jure civili periculosa est.* Dig. lib. 50. tit. 17. All definitions in civil law are dangerous. This is the conclusion to which experience conducted the Roman legislator: and if dangerous in civil law, much more must they be so in criminal law. Why are they dangerous? It is because of the uncertainty that cleaves to them, as the shadow does to the substance. A single word of uncertain signification in the definition, renders the whole definition uncertain; and how often does this happen? We come then to our former position. *Usage* alone can settle the meaning of the words of language. In the case before us, that usage is totally wanting, and until it shall become established, none of those new terms can have any settled meaning. And when may we expect this usage to become established? Not, I presume, until after every one of these terms shall have come under examination in a court of justice, and had its meaning settled by judicial decision.

And how many human victims will this cost? For let it never be forgotten, that in making every one of these judicial decisions, the life, the liberty, or the reputation of some person must be put at stake. And are the people of Louisiana prepared, are they willing to furnish this sacrifice? And for what? Just to gratify Mr. Livingston, by adopting his new codes, which we do not want any more than the sun wants the glimmering of a taper to give him light.

I have now done with the second division of the report. I have noticed all the arguments contained in it, that appeared to me to require an answer, and I trust I have sufficiently answered them all: and if so, the objections I formerly urged against the new penal code, remain in all their force. A few additional remarks, on the third division of the report, will close this work.

The third division of the report before us, is a review by the author, of his Civil Code, and of course not an unfavorable one. It opens with a high eulogium on the work of improving our laws, which he thinks will be effected by adopting his new codes: and then, it goes into a long and elaborate argument, to prove that the punishment of death ought to be abolished.

With this argument I have nothing to do. What kind of punishment is proper, or improper, is a question I have not undertaken to discuss. My business is to vindicate that important branch of our laws, which furnishes rules to determine the previous question, whether, in each case, any punishment at all is to be inflicted. I will only observe, that I am not a convert to his doctrine. "Whosoever sheddeth man's blood, by man shall his blood be shed," is not only a precept of the divine law, but one also of the laws of nature, and therefore must be right.

For the same reason, I have no concern with his code of prison discipline; which relates exclusively to the *mode* of inflicting punishment, and never can come into operation at all, until that part of the law, for which I contend, has had its effect. No one can be punished, until he is found guilty and condemned.

Nor is it my business here, to discuss the merits of the penitentiary plan of punishment. It is certainly

much to be desired that it should succeed; but I confess that, to me, its ultimate success appears doubtful. Experience only can decide: the experiment is going on: let it proceed, and if successful, and I live to see it, no one will rejoice in it more than I shall. But, if deemed expedient to go fully into it in this state, we do not want either the penal code, or the code of procedure, for that purpose; since the laws for which I contend relate exclusively to the proceedings prior to the final sentence, and consequently prior to the code of prison discipline coming into operation at all. One, condemned under our present law, may be as properly committed to the penitentiary, as if condemned under the new penal code, and the new code of procedure. The code of prison discipline is distinct from the others; and relates to a branch of the law which is admitted to stand in need of revision and amendment; which the others do not; and this code may contain useful provisions. But of this I can say nothing, as I have not yet been able to procure it.

In our present law, we have several rules laid down to guide us, in settling the construction of statute laws—rules proved to be just, and exceedingly useful, by long experience. All these are to be swept away by the new codes, which "declare that there shall be but one mode of construing penal laws, according to the *plain import* of the words they employ." Now, we have just seen, that in these codes, the words are so employed as to have no "plain import" at all. Their meaning is unsettled and destroyed, as they are there employed.

In p. 100, our author aims another blow at the courts. "Another article" says he "expressly forbids all convictions for constructive offences, that is, offences that are created by the courts, and not by the legisla-

ture—they alone are the proper organ for declaring what acts or omissions shall be punished; and the text, forbids the judiciary, for reasons which it assigns, from interfering in their functions." This insinuation against the judiciary might have been spared; especially as the constitution, by expressly forbidding all three of the branches of the government to interfere with each other's functions, had already made a much better provision on this subject than his code can do.

"The society," says he, p. 109, "has a right to inflict punishment independent of the restitution" of property which has been stolen. "So far has this been carried by the common law, that by one of its extraordinary fictions the private right is *merged*, as they call it, in the felony, and the individual loses his right to the property, as soon as it can be proved that it was stolen from him; that is as to say, when that is proven which shows conclusively that he has a title to it." I confess I read this with astonishment; for the rule of the common law is, beyond all question, directly the reverse. In one case only, the owner may lose his right to property that has been stolen from him: and that is, where the property has afterwards been sold to a *bona fide* purchaser, in *market overt*, that is, in the open public market. But even in that case, he does not always lose it; for, says Blackstone, vol. 2. p. 454, "If the goods be stolen from a common person, and then be taken by the king's officer from the felon, and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property." *Prosecuting the thief to conviction*, that is, proving that the property was stolen from its owner then, is the very means of securing the owner in his right, instead of being the means of his losing it, as Mr. Livingston strangely asserts.

But what is this "extraordinary fiction," as Mr. Livingston calls it? It is the doctrine of *merger*, which relates, I apprehend, exclusively to civil rights. The same author just now quoted, vol. 2. p. 180, states it to be, "Whenever a greater estate and a less coincide, and meet in one and the same person, without any intermediate estate, the loss is immediately annihilated; or in the law phrase, is said to be *merged*, that is sunk, or drowned in the greater. Thus, if there be a tenant for years, and the reversion in fee simple," i. e. the inheritance in the same land, "descends to, or purchased by him, the term "that is, the estate for years, which is the less," is merged in the inheritance, and shall never exist any more. But they must come to one and the same person, and in one and the same right." *Merger*, then we see, is the swallowing up, or sinking of a lesser *civil right* in a greater, where both have rights to the *same* piece of property, and both belong to the *same person;* the lesser right being *annihilated*, so that it "shall never more exist." It takes no right from the owner, but gives him a higher, and better title, to the same thing which was his before, by an inferior title. But the notion that a *civil right* merges in *a crime*—the right belonging to one person, and the crime committed by another—that the crime of one person should take his lawful right from another, is a position which I believe was never before heard of. One crime may be *included* in another crime, as manslaughter is included in the crime of murder; but I apprehend it never can be said to be merged in it, so as "never more to exist"—much less can a civil right merge in a crime. A man may loose his own civil right by his own crime, but he never can take away, or destroy the civil right of another by it.

In two or three cases, of little importance, Mr. Livingston consents to alter his penal code. In page 97, he gives up his absurd rules for assessing discretionary fines and imprisonments, which required the court to assess, according to the discretionary power vested in them, the fine they considered to be just for one offence, which was not before them, and then, increase, or diminish that fine, one half, one third, &c. as the punishment to be inflicted for another offence, which was before them. See my strictures, p. 18.

In his penal code, he showers down penalties upon the heads of judges, with an unsparing hand. See again my strictures, p. 32. In one of these, he consents to a slight alteration, p. 113. And he has modified another of them, so as to permit a judge, without incurring a penalty, to "advise a suit, or give counsel relative to its management" in the case of near relations," or others, where he cannot sit as judge," p. 115. And he agrees to withdraw a provision, which inflicted a penalty on a witness who swears to what is true, believing it to be false. These are all the changes in his penal code, which I find noted in the report; and it is obvious at first blush, that they are all of them in the provisions which *prescribe punishment*, and consequently do not remove any one of the objections, which I urge against his code in the other great branch of the law. The great and radical vices of the code all remain as they were.

One question more demands attention, which may perhaps be considered an exception from the plan of my remarks. It respects the power of the courts to punish for contempts.

In the chapter "of offences against the judiciary, committed in a court of justice," we find the following: "Courts of justice have no power to inflict punishment

for offences against their authority, other than those specially provided for by this code, and the code of procedure. All proceedings for offences heretofore denominated contempts, shall be abolished. All offences created by this chapter, shall be tried on indictment, or information in the usual form." In another part of the chapter it is directed, that the "fact of the intent," with which any insulting words are spoken to, or of the court, shall be" decided by the jury who shall try the cause. In one case only, the court are allowed to send any person out of the court-house, without first trying him by a jury; and that is, "where any disorderly person wilfully *obs'ructs* the proceedings of the court by noise or clamour." And if such offender, after being thus gently sent away, returns, and continues to disturb the court, they may imprison him *during the time the court sits that day.* Now let the contempt be what it may, under these provisions, the court has no power to punish it, to any greater extent than this, without the intervention of a trial by jury.

This question came under my notice, in writing my strictures; and there it is observed, that "a discretionary power to punish for contempts" is by no means "desirable for a judge, any more than that of fixing the amount of fines and imprisonments is. Both are among the most important duties a judge has to perform, and are, at the same time the most delicate and painful. The object of punishment is not to gratify the revengeful passions of any one—it is not to expiate the offence,—it is to preserve society in peace and safety, by deterring men from the commission of crimes;—and this it does, chiefly by the terror of the example. If the punishment be too slight, the example will be slighted, or wholly disregarded, and will consequently fail of its effect:—if

too severe, the excess, instead of striking terror excites commiseration, and here again the punishment fails of its effect. If a judge errs on either hand, in any considerable degree, he never fails to incur the odium of public sentiment. In the first case, he will be considered as weak, and unqualified for his office, and will (not unjustly) be looked upon as in no small degree the cause of the disorders that never fail to arise under such a weak and inefficient administration. In the other case, he will be considered as a tyrant, that every one would gladly get rid of." Such a power imposes such a weight of responsibility on the judge, that no man of common sense can desire to possess it, for his own personal gratification. It is one which it is impossible for him to exercise for that purpose, with impunity. To do so, would be a violation of his oath of office; for the power is not entrusted to him for any such purpose; and consequently, if he have any conscience, her stings would punish him a thousand times more severely, than our law permits him to punish any one else under this power. Add to this, the scourge of public sentiment, which the most vicious and daring cannot disregard, and it will be seen how little danger there is, of this power being improperly used.

Mr. Livingston says, p. 120, "The offence is the showing a contempt for the court. Of all the words in the language, this is perhaps the most indefinite. Every thing that can by any process of reasoning be considered as a disrespect to the court, is a contempt." This, like almost every account Mr. Livingston gives of the common law in this report, is partial and incorrect. Here he leaves out the *fundamental principle* on which alone any act, or any words can be considered a contempt. The principle is laid down by Blackstone, in the very same

page to which he refers in this place. *Direct* contempts, that author defines to be acts or words "which openly insult or resist," not, as Mr. Livingston says, "the court"—but "the *powers* of the courts;" that is, the authority of the law. It is true Blackstone adds "or the persons of the judges who preside there," which Mr. Livingston seems to have taken as the *whole* of the definition; and is pleased to construe it as meaning the "persons of the judges in their *personal capacity;* which is the meaning he puts upon these words of that author, throughout his arguments, on this point: whereas it is obvious, from the words "who preside there," as well as from the whole tenor of the passage; that it is the judges, *acting in their official capacity*, that are intended. This appears clearly from the same author's definition of "*consequential*" contempts, "which," he says, (without such gross insolence, or direct opposition,) *plainly tend to create an universal disregard of their authority.*" Here then we have a plain principle, by which to determine, in every case, what is, or is not a contempt: it must be such an act as "openly insults, or resists the *powers* of the courts, or the persons of the judges who preside there," *in their official capacity;* or such as "plainly tends to create an universal disregard of their authority." That law then furnishes us a rule, which is directly opposite to Mr. Livingston's statement; a rule so plain that it is scarcely possible for any man of common sense to err, in deciding by it, what is, or is not a contempt. It must be such an act, as either directly, or indirectly *insults*, or *resists the authority of the law.*

Now, to insult the persons of the judges, while sitting in the discharge of their official duties in court, is both to insult, and resist the authority of the law. They sit there ***vested with the authority of the law,*** to admi-

nister justice, and the law gives them a clear right to be undisturbed by any insult, while thus discharging their duties. Nay more, it is the right of the suitors, and of the whole community, that they should be thus undisturbed; since, otherwise, it would be impossible for them to proceed in the discharge of their duties. Without this, the administration of justice could not proceed; and the law itself would become nugatory. To insult the judge, therefore, while sitting in court, as it disturbs him, and obstructs the course of the administration of justice, is clearly to insult, and resist the authority of the law itself, which unquestionably forbids any such disturbance, or obstruction to the proceedings in court. It is not the insult offered to the judge, in his personal capacity; it is to insult him in his official capacity, that constitutes the offence; and this we see, in its consequences, by obstructing the administration of justice, tends to destroy the whole authority of the law. And if this be so, it is unquestionably necessary that contempts of this kind should be suppressed.

The same things are true with respect to the *orders* issued, or given by the court. To treat these with contempt, is to treat the law itself with contempt. For the mandates of the law can be given, or issued in no other way than through the organ which the law itself has appointed. The court is that organ. Therefore their mandates, or orders, *officially* issued, or given, are the mandates, or orders of the law. To disobey these, therefore, or treat them with contempt, is to disobey the law itself, and treat it with contempt. But the mandates of the law must not be disobeyed, nor treated with contempt; for if that be permitted, its authority is lost, and it becomes a mere dead letter. All such acts of disobedience to, or contempt for the official orders of

the court, therefore are offences, that must be suppressed. They are properly contempts, which "plainly tend to create an universal disregard of" the authority "of the law."

The evil of this class of offences I take to be, that they all, either directly, or indirectly obstruct, or produce disorder in the course of the administration of justice, and thereby tend to destroy the authority of the law: and any act, or expression, however insulting it may be, that has no tendency to obstruct, or defeat the course of justice, I should think cannot be considered a contempt, though the act may be an offence of a different kind. I am aware that the doctrine has been extended much farther in England; but under our statutes, I apprehend the principle I have just stated will be found the true one.

Taking this to be the true principle then, the question occurs, how are these offences to be suppressed? Is the summary proccess of attachment, hitherto in use necessary? or, shall the offender, in every case, where punishment is to be inflicted, be entitled to be tried by a jury? Mr. Livingston contends for the latter. That these offences must be suppressed in some way, is agreed—the difference between us, is as just now stated.

Now it is impossible to dispense with summary process altogether. There must be somewhere a point, at which the mandates of the law *begin* to operate. and that is plainly at the first order, or process issued by the court, in any proceeding before them. Now this first order may be disobeyed. How is it to be enforced? An order issues to summon a jury; but that is disobeyed,—and so on as often as any order issues. Here then obedience must be enforced by summary process, or not at all. This, I am aware, is an extreme case:

but it proves my position, that a case *may* arise, in which summary process cannot be dispensed with.

The question then is, how far shall this kind of process extend? We say, to all cases which come within the principle just above stated—to all cases in which the act done, or omitted, or the insulting language used, operates so as to *obstruct the administration of justice*, or *produce disorder in it.* These we contend do not admit of the delay incident to a trial by jury. These acts are enumerated in our statute of March 27, 1823, which confines this process to "what shall be said, or done, or committed directly in the presence or hearing of the court, during the sitting of the same, and which shall abuse, vituperate, or insult the judge, or any, or either of the judges of said court, or any other person in, or belonging to said court, or resist the authority, or interrupt the proceedings thereof." Confine the proceedings to any narrower limits than this statute prescribes, and you thereby destroy the administration of justice.

For example, to show this, Mr. Livingston, as we shall presently see from his arguments, insists on every one's having the privilege of insulting the judges in court just as much as he thinks proper, at least in arguing a cause before them, and that he shall not be punished for it, without first being tried by a jury. Let us then suppose a judge in open court to be insulted in this way. If he be a man, possessing the common feelings of human nature, he will at least repel the insult by replying to it, probably in pretty sharp terms. This will provoke a retort from the other side, and the argument ends in a personal altercation. This disgraceful scene may take place in every cause that is tried; and what then becomes of the administration of justice? The

court cannot punish him without trial by jury, and he disregards that.

And what sort of a case would this make, in a prosecution for the contempt? The insulting expressions are to be stated in the indictment, and proved on the trial. The accuracy of the statement will be contested; the expressions used will be inaccurately or imperfectly recollected, and as inaccurately given in evidence. Counter evidence will be given; disputes will arise as to what insulting language was used; mutual criminations and recriminations will take place, and the quarrel will be disputed over again; and ten to one but some new prosecution arises out of the trial, of the very same kind—and so on. Will prosecutions of this kind do honor to our jurisprudence? Will they facilitate the administration of justice? or disgrace it, and destroy it?

Causes are continually in operation, which are eminently calculated to produce scenes of confusion, and put a total stop to proceedings in courts of justice, which require the immediate interposition of some *efficient* superintending power to suppress them. In the heat of argument, how often does some expression drop, at which the counsel on the opposite side takes offence, and repels it by expressions still more calculated to offend? Altercation ensues, and if the court interpose, their authority is set at naught. Each of the parties thinks he is right, and cares not for any trial by jury, for what he is doing. Meantime, the proceedings are at a full stop, until the parties can settle the dispute between themselves; or perhaps the parties come to blows, and a riot ensue in the very face of the court.

Again, one of the counsel interrupts another, and here again a dispnte arises, which of them has a right to be heard. The court decides; but the party still thinks the right is in his favor. The court orders him to desist, but he disregards the order, and goes on: he thinks he has the right, and he cares not for the prosecution and trial by jury. The jury are to decide "the fact of the *intent*," and he can easily defend himself, by saying that his intent was to defend his client's cause, and not to commit a contempt. Meantime, here again all is confusion, and all proceedings at a full stop, as to the trial of the cause before the court.

Again, the party cast is never satisfied with the decision. He can easily find some reason that convinces *him* that the court has decided wrong; and he will be heard again. The court are satisfied that their decision is right, and confirm it. But the party will be heard again; and if the court refuse to hear him, and order him to desist, he disregards the order. He too thinks he is right, and cares not for the prosecution and trial by jury. Meantime, the other party replies to his argument, and the dispute goes on, and may go on, till the end of the term, in spite of any thing the court can do to put an end to it. Not a collateral question can arise, but what may be spun out in this way, no one can tell to what extent; and in the mean time no other suitor can be heard, and the whole business of the court is stopped.

Once more: The parties may get to disputing about their cause, raise a quarrel about it in the presence of the court, and if they get to making a "noise and clamour," the court "may cause the offenders to be removed from the building in which the sessions of

the court are held," and when out of that "building," they may go on with their dispute, and make what "noise and clamour" they please, within three feet of the door of the court house, and keep it up as long as they please. They are only disputing about their cause, without any "intent" to show any "disrespect to the court." Each thinks himself in the right, and they care not a button about the prosecution and trial by jury.

Yet once more: A dram seller may erect his booth within twenty feet of the court house; open his dram shop there; collect as many drunken vagabonds about him as he can find, and keep up as much "noise and clamour" as he pleases, during the whole term of the court: and if you prosecute him for the contempt, he laughs at you. He had no "intent" to show any "disrespect to the court," but only to make a little money by selling drams.

But why should I multiply cases of this kind? These surely are enough to prove my position, that if the power of the court to punish these offences, by summary proof of attachment, be taken away, as Mr. Livingston would have it, in sober truth, there will be an end to the administration of justice. And what then becomes of the law itself? It loses all its force; it can no longer afford the slightest security or protection to any one; an universal disregard and contempt for its authority takes place; and a dissolution of all order and government, is the final consequence. See then the fatal consequences to which this new theory, on which Mr. Livingston so strongly insists, will lead us.

Let us now attend to his arguments. We have already seen that he states the offence to be, "showing a contempt for the court," leaving out of the account all consideration of *authority of the court* to administer justice, and inforce obedience to the law; and we have seen how fallacious such an account of these offences is. Yet taking his own statement as if it were, in all points, correct and complete, he proceeds as follows, page 120:

"Now, I put it to those who contend that this power ought to be vested in courts, I put it to them to say, what is the conduct that will secure a man against its exercise in the hands of a vain or vindictive judge? A want of regard and respect! but regard and respect cannot be commanded but by moral conduct, and not always by that. The most correct conduct will not always secure it; the feeling is involuntary, and cannot be punished. But you must not show that you want it: it is the demonstration that is culpable. But how shall I avoid showing it? When in my own defence, or in prosecution of my right, I differ from the judge, and show that the opinion he has given is absurd, certainly I treat him with very little regard or respect. I can feel none for a man who, by some miserable sophistry, deprives me of my right; and if I expose it to the world, I then show my want of respect; but a want of respect is a a contempt. I am therefore liable to be punished for defending my right, in the way only that justice requires it should be defended. Oh! say the advocates of this tyrannical power, you must distinguish; attack the argument of the judge as much as you please, but say nothing disrespectful of the court. But what jesuit will teach me how I may tell a court

that it has decided against the plainest principles of law, without showing that I think they have been ignorant, careless, prejudiced, or worse? When I know that by reason of either of these faults, they are about to deprive me of my fortune, or my life, can I feel regard or respect? When I state the reasons by which I demonstrate it, do I not, (clothe it in what language I will) do I not make that want of regard manifest? And is not this (according to the very terms of the author I have quoted) a contempt?"

I now, in my turn, put it to Mr. Livingston to say, whether he will seriously contend for the doctrine on which this argument is founded? Not to insist on the obvious fallacy that runs through the whole of it, that an argument for a rehearing cannot be made so as not to be a contempt—and also that other fallacy, that a mere want of "regard and respect" for the court, leaving out of view the *official capacity* in which they are acting, is what the law considers as a contempt, which also runs through the whole argument, and which, has already been exposed—not to insist on these, the decisive answer to this is, that it is grounded on the supposition, that *the party has a right to be the judge in his own cause!* "When I differ from the judge, and show that the opinion he has given is absurd." Who decides this? Why, says the party, "I differ from the judge; that is, I decide that his opinion "is absurd!" Again, "When I know that, by reason of either of these faults," the judge, or the court, "are about to deprive me of my fortune, or my life." What faults? Why, that "they have been ignorant, careless, prejudiced, or worse." How do you know all this? Why, "by some miserable sophistry,"

they deprive me of my right. Who decides that the reasoning of the court is "miserable sophistry?" and that what they, by their decision, deprive you of, is your *right*? Why, "I differ from the judge," says the party, so "I know that they have been ignorant, careless, prejudiced, or worse." And "by reason of" one or other "of these faults, they are about to deprive me of my fortune or my life:" that is, you have so decided in your own cause; and on the ground of that decision, you insist on being at liberty to treat the court with whatever "want of regard or respect" you please—in other words, to insult them just as you may, in your own cause, decide to be reasonable—as much as you think they deserve!

When an attachment issues for a contempt, Mr. Livingston says the accused is brought in "*to give evidence against himself.*" This account again is partial and incorrect. It is true the accused is bound to answer on oath to interrogatories pertinent to the charge exhibited against him. But Mr. Livingston forgets to mention that an attachment of this kind never can issue at all, unless *the fact* of the contempt take place in the presence and view of the court, or is proven by sufficient affidavits of credible witnesses. On this testimony the attachment issues; on this the accused is taken, and brought in to answer; and on this he is condemned, if he refuse to answer. But all this evidence against him weighs nothing, if he be able, by his own oath, as an innocent person always is, to deny the charge, or state circumstances that justify or excuse what he has done. The testimony of his own oath is conclusive in his own favor; so that it is impossible for an innocent person to suffer by the process. This frightful power then, to

compel the accused "to give evidence against himself," as Mr. Livingston calls it, is really nothing more than allowing him to be a witness *for himself*, and making his own testimony conclusive in his own favor. It is really a privilege allowed to him, instead of being oppression exercised against him.

"A free citizen ought not to hold his liberty for an hour, or the slightest portion of his property, at the will of the magistrate." Granted. But Mr. Livingston will allow, that we all hold our liberty, and our property too, at the will of the law, and that the law *must be administered by the magistrate*, or not at all. And if it be necessary, as we have seen it is, that contempts should be punished by the summary process of attachment, this must be done by the magistrate. This power is, and must be given *by the law*; and if we are all subject to its exercise, nothing can be more incorrect than calling this being subject to "the will of the magistrate."

"But, as if it were to make this example one in which every principle of correct jurisprudence was to be violated, the person offended is constituted the only judge—the judge without appeal: and lest his resentment should have time to cool, he is armed with summary process." Still the same kind of partial and incorrect account is here given. The judge's being the organ and representative of the law—his being actually engaged in discharging the impartial duties of his office—the absolute necessity of preserving order in the administration of justice—and the impossibility of doing this, without his being armed with this summary process, together with all the dreadful evils consequent upon suffering the good order of judicial proceedings to be destroyed—

all this is left out of the account! "The person offended is the only judge!" No; the law itself is offended; the whole community is the injured party; and the judge only discharges a sacred duty, when he punishes a contempt, and thereby vindicates the injured dignity of the law.

"Although the party should deny any disrespectful intent in the most unequivocal terms, the court may declare that the answer is false, and proceed to impose the punishment." We should beware of a fallacy that lurks here. "The court may declare that the answer is false." What, the whole answer? as to *the fact* of the *act done*, or *omitted* by the accused? If this be what is meant, it is wholly incorrect. The answer to this, as we have already seen, is conclusive in favor of the accused; that is, the court may not declare it false, but are bound to consider it as true. But as to the "disrespectful intent," which is all Mr. Livingston himself here states to be denied, it is true, the court may declare it false in this point only. And it must of necessity be so. Were it otherwise, a man might spit in the face of a juror, or call a witness a liar in open court, and then excuse himself by swearing that he only intended to treat the juror, or the witness, with contempt, and not the court or the law. But this, we have seen, could never be endured.

"Blackstone," Mr. Livingston says, acknowledges that it [i. e. the summary process in question] "is not agreeable to the common law in any other instance, but he does not attempt to justify it even from necessity, and contents himself with showing that it is of high antiquity, and by immemorial usage, has become the law of the land; that is to say, that it is

common law, and as that is the perfection of reason, it must be good." This sneer at the common law may be suffered to pass as quite harmless. But let us hear Blackstone, vol. 4, p. 283. "The process of attachment," says that author, "must necessarily be as ancient as the laws." Why "must" this be so? "For," says he, "laws without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal." Here then we see that Blackstone does not, as Mr. Livingston says he does, "content himself with showing that it [this power] is of high antiquity, and by immemorial usage has become the law of the land;" thus inferring the *authority* of the law, from its *antiquity* and immemorial usage; but on the contrary, he infers its *antiquity* from the *necessity* of such a power existing. It "results," he says, "from the first principles of judicial establishments, and must be inseparable from every superior tribunal;" and must have been always necessary to "secure the administration *of the laws* from disobedience and contempt." Mr. Livingston therefore is rather unfortunate in this appeal to Blackstone.

Mr. Livingston grounds his next argument on analogy. "An individual," he says, "has the right of defending himself against an attack upon his liberty or his life; but after he has sufficiently resisted it, he has no right to punish; yet liberty and life are considered as sufficiently protected by this limited power. Courts

of justice have the same right to repel all attempts to interrupt the performance of their functions. They are incorporeal beings, whose existence is only in the performance of their functions—that is their liberty. They are, or ought to be, armed with every power necessary to defend them. Noise, interruptions, violence of every kind, must be repressed; obedience to all lawful orders must be inforced. Thus far the law of self defence goes, but no farther. Is the violence over—has the interruption ceased—is the intruder removed—has the order which was disobeyed been complied with? Here the power of the incorporeal being, as well as that of the individual in the analogous case ceases, and the duty of the sovereign power begins. That alone must punish; that alone can define offences and fix the penalty for committing them. An infringement of the legal rights of a court of justice, is an offence; and that government is radically defective, which places the power to punish in the hands of the offended party. Here then we find the limit of that necessity, which is so much insisted on, and so little understood. There is a necessity that courts should have the power of removing interruptions to their proceedings, because unless they can perform their functions, they cannot exist; but there is none that they should have power to punish their interruptions; the law must do that by the instrumentality of the courts."

Here we are told that the courts are "incorporeal beings;" but, a little while ago, the court was said to consist of "a vain or vindictive judge:" not quite consistent, but let that pass.

Mr. Livingston places great reliance on this argument. "If the argument," says he, p. 125, "has been as clearly expressed as its force is felt, it must be con-

vincing to show that all those offences, designated by the name of contempts, ought to be banished from our law." It is strange he did not perceive its fallacies. The courts, he says, are "incorporeal beings." Now, I had always supposed them to consist of magistrates vested with power to administer justice according to law, and until Mr. Livingston gives some further proof, I must still consider them so.

But the whole argument is grounded on a supposition that is not true. It supposes the power, or authority to punish, which is *necessary* to be given to a court of justice, to be precisely the same that is necessary to be allowed to an individual; a position which he will not find it easy to maintain. This position he has not proved, and until he does prove it, his whole argument falls to the ground.

But he has attempted to prove it. Let us examine his proofs. When an individual has successfully repelled an attack "upon his liberty or his life," he is "considered as sufficiently protected," without having the right to punish the aggressor. The power to punish after the attack is repelled, cannot be safely intrusted to *the individual.* But does it follow that it cannot be intrusted to the court? The individual may lawfully repel the attack, but it is not true that his life and liberty are thereby sufficiently protected. A power to punish for the assault must be vested somewhere, and as it cannot be safely given to the individual, it must be vested in the court. Without this, there could be no security against a repetition of the injury. Just so in the case of contempt. Suppose "the violence over"—"the interruption ceased"—"the intruder removed"—"the order which was disobeyed complied with"—does this afford any security against the

repetition of these offensive acts, unless there be a power somewhere to punish them? Not the smallest. There is then a necessity to vest that power somewhere; and where shall it be vested but in the court? Here, then, the case of the individual, and that of the court, are entirely different: the power to punish cannot be given to the former; it must be given to the latter, else it must cease to be a court. The argument, therefore, completely fails.

It should be remembered too, that the power in question is not given merely to enable the judge to protect his own person, though that be included, but chiefly to enable him to extend the protection of the law to others; and indeed it would seem a little strange, that while he is exercising the high trust confided to him, clothed with power to protect others, he alone should be liable to be insulted with impunity. In this situation Mr. Livingston would leave him; for we have seen that the provisions of his code would afford him no apparent protection at all.

But this will appear still more strange, when it is considered that the very nature of the duties which a judge's office compels him to perform, expose him to be insulted a hundred times, where a private individual is once so exposed. The party cast is never satisfied with the decision; and he meets with little difficuly in finding some reason to satisfy himself that the judge has, as Mr. Livingston is pleased to express it, "by some miserable sophistry, deprived him of his right." He will be heard again; and if the jugde is not convinced by his *strong reasons*, he is exceedingly apt to become irritated, and strongly inclined to bestow a few curses upon the court. The counsel themselves sometimes manifest a little of the same temper. Take

away the restraint then, and scarely a cause, or a collateral question would be decided, in which the judge would escape without a cursing.

What renders the case stranger is, that the judge is, by the obligations of his office, precluded from resorting to those means of defence, which the world deems honorable, and which, in some cases, even the law itself considers almost excusable.

The power, we have seen, must exist somewhere. This is absolutely necessary. Can it be better placed in any other hands? If so, let it be done. If not, then the alternative is before us: it must remain as it is; or we must give up the administration of justice.

Mr. Livingston complains of being considered hostile to the judiciary. Whatever his feelings, or wishes may be towards that branch of the government, it is not my business here to inquire. I will only observe, that the unfounded charge of usurping legislative powers, which he has brought against the courts, and which he repeats, and dwells upon with apparent complacency, seems to speak pretty plainly on this point. It is the tendency of his codes with which we are chiefly concerned; and on this there seems to be little room for doubt. I consider them as tending strongly to destroy the constitutional powers and authority of the courts of justice, and thereby to cut down one of the under pillars of the government, and involve the whole in ruin.

I have thus, to the best of my ability, and within the limited time my official duties have permitted me to devote to the subject, examined the arguments Mr. Livingston has advanced in favor of that entire change in our criminal jurisprudence, which is contemplated by his codes, and which he so earnestly urges

our legislature to adopt. And it is now left to the people, to whom these remarks are respectfully addressed, to say, whether the objections to the new code, which I formerly had the honor of addressing to them, have been removed; or whether they are not rather left in all their force, by the arguments Mr. Livingston has advanced in opposition to them. In my judgment, he has not even weakened their force, much less removed any of them.

In closing this work, I do not profess to have pointed out all the defects in these new codes. Many have been seen, which I have neither room nor leisure to point out; and, unless this new code differs from all the new laws that ever yet were framed by human wisdom, *latent defects* s ill more numerous, must exist in it, which nothing but experience can ever bring to light.

Not only the defects I have pointed out, but the others to which I have alluded, I am confident will not escape the notice of the legislature, and more especially I am convinced, they will not pass without observation by the learned and talented members of that body, who are appointed a committee to examine and report upon the codes.

If the interest I take in the subject, were to be tested by the possible influence these new laws might have on me as an individual, small indeed would that interest be. I am now far advanced in the vale of years: my life is fast ebbing out. To me, therefore, whatever this world can offer diminishes, as the prospect that opens in another increases, in value and importance. But I have still motives that bind me to the people among whom I live. With them, I expect the evening of my life to close; and with them I expect to

leave my children, who are to feel, in common with their fellow citizens, the effects of these new laws, should they ever pass. And besides, "as long as a man is permitted to live, it is an intimation of Providence, that he has some duty to perform, which it would be mean and criminal in him to desert." And I have felt it *my duty* in this instance, imperfectly I am aware, but earnestly and with the utmost sincerity, to warn my country against the evils, which I am thoroughly convinced must follow this entire, unnecessary and dangerous change of our criminal jurisprudence.

If I have succeeded in showing Mr. Livingston's code to be a dangerous innovation; that some of its provisions are actually unjust and iniquitous; and that the uncertainty and confusion it must necessarily introduce into our law, very far exceed every thing of that kind to be found in our present system, I have surely shown enough to insure its rejection. I, and my fellow citizens who think with me, may, I trust, rest satisfied that no suggestions of flattery, nor the vain pride of being the workmen who assist in creating a new edifice, will induce the members of the legislature to overthrow that venerable fabric, under which we have so long been sheltered from the storms of oppression; under which the peace of society has been preserved; the guilty punished, and innocence found a sure protection.

I do not rest the cause here. I go further, and say, that if, in the opinion of any who may read these remarks, I have failed to demonstrate the superiority of our law, as it actually exists, over that which Mr. Livingston urges upon us as a substitute for it; yet, if I have excited *rational doubts* as to the comparative advantages of the two systems, these doubts call impe-

riously for the rejection, (at least for the present,) of the new code. It has already been noticed, that if this code be once adopted, and it is found defective, we never can get rid of it, and return to our former system. The peculiar provision of our constitution, which forbids the adoption of any code or system of laws, by a general reference to them, destroys all hope of our ever recovering our present jurisprudence, if we once abandon it. Is it not, therefore, better

> ——————"to bear the ills we have,
> Than fly to others that we know not of?"

It is a maxim equally sound in relation to public affairs, as to those of private life, never to give up a certain good, though it be alloyed with some inconveniences, for any substitute, which, however brilliant and inviting it may appear in theory, may yet, on trial, be found not equal to that which was surrendered. Nations, as well as individuals, have been ruined by disregarding this maxim. Yet, in the case before us, if the new code be adopted, I ask, do we not set this maxim utterly at naught?

I do not believe the new code would be as good as our present system is. I feel confident, that I have demonstrated that it is not. Mr. Livingston believes that it would be better: yet all that its most zealous advocates can urge in its favor, cannot *prove* it such; for that never can be proved other than by *actual experience;* and we have already noticed what the experiment must cost us. Doubts, therefore, do, and must exist, until the experiment shall be made: and these doubts surely ought to make us pause before we incur the hazard of adopting the new code. By declining it at present, we still remain free to

adopt it hereafter, should it ever *be proved* to be a better system than that which we now have. Whereas, if we adopt it now, and the objections made to it should be found to rest on solid grounds, as I firmly believe they will, the state is injured to her very vitals, without the possibility of finding any remedy, so long as the present constitution exists. And

There is an obvious mode of removing our objections to the new system, and *proving* it to be better than our old one, if our objections be not well founded; and, since the hazard *to us* of adopting it without that proof, is so immense, surely we ought (it is a duty we owe to ourselves, and to our children, whom we are about to involve in all the consequences) to insist on the proof before we adopt the codes. If the evils and abuses of our present criminal jurisprudence are so apparent, and of such a pernicious nature, as Mr. Livingston depicts them, and if his code be so perfect and so admirably calculated as he says it is, to remedy these defects, surely some one of our sister states will, ere long, adopt it. With their eyes now fully opened to the barbarism, inconsistencies, and tyranny of that law under which they have suffered (without being conscious of it, it is true) for nearly two hundred years, we may not hope that Virginia, under the guidance of her able and enlightened statesmen, or Massachusetts, who once led the way to freedom, will shake off at once the odious system, by which their prosperity has been so much retarded, and seize with pleasure the admirable system which Mr. Livingston offers them as a substitute. When they have made a trial of it, and it is found to work well, we can adopt it. The necessity which we have for caution, with them does not exist. They

have no constitutional provision, which will prevent their returning to their old jurisprudence, if the new does not suit them. We have. They can make the experiment with perfect safety. We cannot. With us the danger would be imminent, and the evil without remedy. Is it not madness, then, or something worse, for us, tramelled as we are, to put our all at stake, and embark on an unknown sea, where, if we do not navigate successfully, we never can return to the port we left?